No. _____ (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BOB YARI,

Petitioner,

—v.—

JAY PRITZKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether the United States District Court for the District of Puerto Rico and the United States Court of Appeals for the First Circuit violated Article 3, Section 1, of the United States Constitution by extending and expanding the scope of Article 1425 of the Civil Code of Puerto Rico beyond its express terms and intended meaning?

2. Whether the United States Court of Appeals for the First Circuit departed from the accepted and usual course of judicial proceedings by failing to follow the decision of the United States Supreme Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, and refusing to consider proffered legislative history, historical analysis and foreign legal sources in determining whether Article 1425 of the Civil Code of Puerto Rico (governing redemption of litigious credits) applied to a financing agreement which transferred no legal or equitable rights, title or claims in litigation?

List of Parties to the Proceedings in the Courts Below

Bob Yari, Defendant-Appellant

Baird, Patrick & Co., Defendant-Appellant

Lincoln Realty, Inc., Defendant-Appellant

Paul S. Dopp, Defendant-Appellant

Jay Pritzker, Plaintiff-Appellee

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IN THE

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OCTOBER TERM, 1994

No. _____

BOB YARI,

Petitioner,

—v.—

JAY PRITZKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Bob Yari ("Yari"), the petitioner herein, respectfully prays that a writ of certiorari issue to review the order and decision of the United States Court of Appeals for the First Circuit, entered in the above-referenced action on December 13, 1994.

OPINIONS BELOW

The December 13, 1994 opinion of the United States Court of Appeals for the First Circuit, whose decision and order herein sought to be reviewed, is reported as *Pritzker v. Yari*, 42 F.3d 53 (1st Cir. 1994), and is reprinted in the separate Appendix to this Petition, pp. 1a-36a. By decision and order entered January 12, 1995, the First Circuit denied Yari's and defendant Paul S. Dopp's ("Dopp's") petition for rehearing

with suggestion for rehearing *en banc*. This order is reprinted in the Appendix at pp. 93a-95a. The prior opinion and order of the United States District Court for the District of Puerto Rico (Judge Jaime Pieras, Jr.) is reported as Civil No. 92-2825 (JP), dated March 5, 1993, unpublished, and reprinted in the separate Appendix to this Petition, pp. 37a-78a. A related opinion of the District Court is reported as *Dopp v. HTP Corp.*, 831 F. Supp. 939 (D.P.R. 1993), and reprinted in the Appendix, pp. 79a-92a.

Other opinions rendered in this case by the United States Court of Appeals for the First Circuit are reported as *Dopp v. Pritzker*, 38 F.3d 1239 (1st Cir. 1994), and *Dopp v. HTP Corp.*, 947 F.2d 506 (1st Cir. 1991). Similarly, another opinion rendered in this case by the United States District Court for the District of Puerto Rico is reported as *Dopp v. HTP Corp.*, 755 F. Supp. 491 (D.P.R. 1991).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the First Circuit was rendered on December 13, 1994. A petition for rehearing, with suggestion for rehearing *en banc*, was filed timely and denied on January 12, 1995.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

U.S. Constitution, Article I, Section I

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Constitution, Article III, Section I

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article 1425 of the Civil Code of Puerto Rico, P.R. Laws, Ann., Title 31, Section 3950.

> § 3950. Right of debtor to extinguish litigated credit.
>
> When a litigated credit is sold, the debtor shall have the right to extinguish the same by reimbursing the assignee for the price the later [sic] paid for it, the judicial costs incurred by him, and interest on the price from the day on which the same was paid.
>
> A credit shall be considered as litigated from the day the suit relating to the same has been answered.
>
> The debtor may make use of his right within nine (9) days, counted from the day the assignee should demand payment of him.

STATEMENT OF THE CASE

This case concerns the Constitutional prohibition on legislating by the judiciary and, as a corollary, a litigant's continued right to seek justice through the judicial process. Specifically, this petition focuses on Paul S. Dopp's right to obtain from a third–party, Bob Yari, financing for the purpose of maintain ongoing litigation against Jay A. Pritzker ("Pritzker") (the "Dopp/Pritzker Litigation") and Yari's right to receive the benefit of his contractual bargain. The lower courts erroneously characterized the financing agreement

between Dopp and Yari as the sale or assignment of a litigious credit subject to redemption (and extinguishment) by Pritzker pursuant to Article 1425 of the Civil Code of Puerto Rico ("Article 1425").

By so doing, the courts below (a) violated Article 3, Section 1, of the United States Constitution (and Article 1, Section 1, thereof) by extending and expanding the scope of Article 1425 beyond its terms and intended meaning; (b) departed from the accepted and usual course of judicial proceedings by failing to follow the decision of the United States Supreme Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, and refusing to consider proffered legislative history, historical analysis and foreign legal sources in applying Article 1425 to a financing agreement; and (c) frustrated a prior mandate, reported as *Dopp v. HTP Corp.*, 947 F.2d 506 (1st Cir. 1991), which directed a second jury trial on the issue of calculating the damages for which Pritzker is liable to Dopp.

The Dopp/Pritzker Litigation is a breach of contract suit concerning the ownership of approximately 1,000 acres of oceanfront property including the Dorado Beach Hotel, the Cerromar Hotel and four golf courses. In March of 1990, a jury sitting in the United States District Court for the District of Puerto Rico found that Pritzker, *inter alia*, breached his oral contract with Dopp and compelled him, by deceit and duress, to enter into a subsequent agreement by which he was forced to grant Pritzker an option to purchase his share of their joint venture (structured to acquire the oceanfront property, hotels and golf courses) for a mere $1,000,000 at any time during the next ten years. The jury found Pritzker liable for damages in the amount of $2,000,000. The First Circuit affirmed the jury verdict on liability but remanded the case for a second jury trial on the subject of damages—to be calculated under three alternative theories from which Dopp will elect his recovery.

Unable to finance the ongoing and significant cost of prosecuting the Dopp/Pritzker Litigation, Dopp entered into a contingency fee agreement with his attorneys. However, Dopp still required substantial additional funds for expert investigations, reports and testimony necessary to prosecute his case and proceed under three alternative theories for the calculation of damages.

In the Spring of 1992, one of Dopp's business contacts introduced Dopp to Bob Yari, a real estate investor and developer. Dopp described to Yari the nature of the litigation, the properties involved and provided to Yari relevant documentation. Yari became interested in Dopp's predicament and the two began to negotiate Yari's funding of the Dopp/Pritzker Litigation.

On July 23, 1992, the negotiations culminated in a written agreement (the "July Agreement") whereby Yari agreed to provide Dopp with money, advice and consultation for the Dopp/Pritzker Litigation. Yari agreed to advance to Dopp $250,000 and offer his personal guaranty to assist Dopp in obtaining a $2,500,000 line of credit. The July Agreement provided that Yari and Dopp would share, in accordance with a prescribed schedule, the monetary proceeds of any final judgment in the Dopp/Pritzker Litigation. The July Agreement did not transfer or assign to Yari any of Dopp's claims against Pritzker. Dopp also negotiated financing agreements with Baird, Patrick & Co. ("BPC") and Lincoln Realty, Inc. ("Lincoln").

Despite Yari's personal guaranty and his subsequent pledge of unencumbered property valued at $7,000,000, Dopp was unable to secure a line of credit. By letter agreement dated September 24, 1992, Yari and Dopp amended the July Agreement. While Yari and Dopp acknowledged that the July Agreement continued "in full force and effect . . . despite the fact that a Line of Credit may not be attainable," Yari and Dopp agreed that "some form of cash contribution will be

made [by Yari] to allow the [Dopp/Pritzker] litigation to proceed diligently." Said cash contributions were to be negotiated by the parties "in good faith." (The agreement, as amended, is referred to herein as the "Dopp/Yari Agreement"). Yari complied with all requests by Dopp for funds. In total, Yari advanced to Dopp approximately $500,000.

On October 9, 1992, in the course of discovery, Dopp disclosed to Pritzker the existence of his agreements with Yari, BPC and Lincoln. One week later, Pritzker offered to tender to Yari (and BPC and Lincoln) the amounts paid to Dopp in exchange for Yari's (and BPC's and Lincoln's) rights under the agreement(s) with Dopp (Pritzker did not make an actual tender of funds until December 18, 1992). However, Pritzker explicitly refused to assume Yari's continuing contractual obligation to finance the litigation.

On December 12, 1992, Pritzker commenced a separate action against Yari, BPC and Lincoln (the "Finance Litigation"), claiming that Dopp's respective finance agreements constituted sales of litigated credits under Article 1425 subject to being redeemed and extinguished by Pritzker.

On December 18, 1992, Pritzker deposited with the Court the sum of $464,000, purportedly as tender of the amounts paid by Yari to Dopp. Again, Pritzker made no offer to provide a personal guaranty to secure a line of credit to Dopp or to continue to fund the Dopp/Pritzker Litigation going forward. Both the guaranty and the obligation to fund continuously the Dopp/Pritzker Litigation were at the heart of the Dopp/Yari Agreement.

At this point, expert witnesses retained by Dopp (made possible by financing provided by Yari) were working furiously to prepare for the trial on damages (which would take place on March 8, 1993). It was obvious that Pritzker's "tender" was a blatant attempt to cut off funding to Dopp such that Dopp would be unable to complete his preparation for trial.

On January 15, 1993, prior to the date by which Yari was to answer the complaint in the Finance Litigation, Pritzker, in an effort to increase the pressure on Yari to stop funding Dopp, filed a motion for partial summary judgment seeking a declaration that Article 1425 applied to the Dopp/Yari Agreement. Yari opposed the motion and cross-moved for a declaration that Article 1425 was inapplicable.

By decision and order dated March 5, 1993, the District Court found, *inter alia*, that Article 1425 applied to the Dopp/Yari Agreement and ordered a hearing to determine the amounts which Yari, BPC and Lincoln paid to Dopp.

Notwithstanding the District Court decision which, in essence, emasculated the Dopp/Yari Agreement, Yari continued to honor his obligation to Dopp by advancing an additional $50,000 so Dopp could continue his trial preparation. On May 14, 1993, Yari filed an answer to the complaint in the Finance Litigation and asserted against Pritzker a counterclaim for tortious interference with contractual rights, and asserted against Dopp a cross-claim for a declaratory judgment that Yari performed all obligations under the Dopp/Yari Agreement.

On June 10, 1993, the District Court held a scheduled hearing in the Dopp/Pritzker Litigation. During the hearing, Pritzker reaffirmed his refusal to assume fully Yari's obligation to fund the Dopp/Pritzker Litigation. Thereafter, Yari moved to dismiss Pritzker's complaint in the Finance Litigation on the grounds that Pritzker's "tender" was improper and made in bad faith. The District Court denied Yari's motion and stated that Pritzker remained entitled to take over Yari's position (without assuming Yari's obligations). Nevertheless, Yari declared his intention to honor his obligations to Dopp and provide funding for the Dopp/Pritzker Litigation.

On September 9, 1993, the District Court determined that Yari had performed fully his agreement with Dopp and that Pritzker was entitled to redeem 50% of Yari's rights under the

Dopp/Yari Agreement—despite the fact that Pritzker adamantly and openly refused to fulfill *in futuro* Yari's obligations to Dopp.

Notwithstanding the District Court's rulings—that Article 1425 applied to the Dopp/Yari Agreement—and in light of Pritzker's refusal to honor Yari's obligations under the Dopp/Yari Agreement, Yari continued to fund the Dopp/Pritzker Litigation. Between the June 10, 1993 hearing and October 18, 1993 (the date that Yari filed with the District Court an informative motion), Yari advanced an additional $90,000 "to meet current costs and expenses as well as past due obligations incurred as a result of the lengthy legal process and as set out originally in [the] July 23, 1992 Agreement."

On December 13, 1994, the First Circuit held that the respective financing agreements between Dopp and Yari, BPC and Lincoln "fall squarely within the purview of article 1425" and affirmed Pritzker's purported right to redeem the amounts due to Yari without requiring Pritzker to assume all of Yari's obligations to Dopp. This ruling cries out for correction by this Court.

The First Circuit, in essence, rewarded Pritzker for Dopp's financial shortcomings. Under the Dopp/Yari Agreement, Yari was to receive a specified dollar amount (pursuant to a prescribed formula) in exchange for advancing to Dopp litigation costs, advice and consultations. Pritzker was permitted—by tendering a fraction of the amounts Yari was obligated to provide—to extinguish that *entire* dollar amount promised to Yari. Indeed, Pritzker openly and adamantly refused to assume Yari's entire obligation under the Dopp/Yari Agreement. However, Pritzker was awarded the entire consideration due Yari. Article 1425 was never intended, under any rationale or application, to provide a windfall for the debtor.

Financing a litigation is distinctly different from purchasing litigious rights. The furnishing by a third party of funds

necessary for litigation expenses serves a legitimate purpose. Here, Dopp would be unable to absorb the financial burdens attendant to his continued pursuit of justice if not for the financial assistance provided by Yari, BPC and Lincoln. It would be especially distressing if Pritzker, who has already been found to be liable to Dopp, is allowed to escape liability (or a significant portion thereof) by merely tendering "nuisance value" (*i.e.*, litigation costs).

Indeed, the courts below recognized the financial disparity between the parties when they found that "Dopp has struggled, and will continue to struggle, in his efforts to obtain financing for this litigation. Pritzker is a billionaire who could never be forced to relent in his defense. This litigation is sure to continue and Dopp will again be faced with the need for funds." *Dopp v. HTP Corp.*, 831 F. Supp. 939, 957 (D.P.R. 1993); *Pritzker v. Yari*, 42 F.3d 53, 72 (1st Cir. 1994). Nevertheless, as Dopp's costs mount and he meets from outside sources his continuing need for funds, Pritzker will be able to whittle away his liability thanks to the courts below. In fact, it is now in Pritzker's best interest to escalate exponentially the costs of litigation to accelerate the proportional diminishment of his outstanding (unextinguished) liability.

The lower courts' decisions dilute the notion of "liberty and justice for all." Instead of a judicial system open to litigants of all means, the lower courts have closed the courthouse doors to those without the personal finances to exhaust all avenues of judicial recourse. Indeed, the courts' rulings prohibit a party, whose sole asset derives from a litigation, to utilize that asset in an effort to seek justice and realize its true worth—all that can be realized now is its nuisance value. It is most distressing where, as here, all that remains is a trial on damages—the First Circuit having affirmed a jury verdict in favor of Dopp on the issue of liability. Unfortunately for Dopp, he ran out of money.

REASONS FOR GRANTING THE WRIT

The First Circuit, in affirming the decision of the District Court, ignored the plain meaning of Article 1425 and its legislative history and perpetuated the District Court's unconstitutional and unwarranted judicial encroachment into the legislative arena. Notwithstanding that the District Court expressly recognized that the Dopp/Yari Agreement was outside the purview of agreements contemplated by the legislature, both the District Court and the First Circuit unconstitutionally imposed a balancing of personal and public interests which presumptively are a matter of legislative prerogative. *See In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1987), *aff'd*, 491 U.S. 617 (1989). Indeed, the District Court noted:

> The Dopp/Yari Agreement is far outside the heartland of agreements contemplated by the legislature when it enacted Article 1425. It is likely that the lawmakers did not envision the possibility of a case like this. Property and assets have traditionally been mortgageable to protect and preserve their value. In this case, the lawsuit's worth is an asset which requires expenditures for the services of attorneys and experts, as well as for other general costs of litigation to preserve its value. To apply Article 1425 without allowing for adjustments to reflect expenditures that have permitted the lawsuit to survive would be to deplete and maybe extinguish altogether the value of the lawsuit; this could not have been the intention of the legislation.

Dopp v. HTP Corp., 831 F. Supp. 939, 948 (D.P.R. 1993).

Nevertheless, the courts below ignored the plain meaning of Article 1425, refused to consider its legislative history and expanded application of the law to matters which the courts acknowledged were never contemplated by the legislature. In their respective holdings the lower courts violated the constitutional prohibition on inferring legislative provisions out

of silence. *Emery Mining Corp. v. Secretary of Labor, Mine Safety & Health Administration*, 783 F.2d 155 (10th Cir. 1986).

I.

THE COURTS BELOW IGNORED THE MEANING OF THE STATUTE

The First Circuit ignored the explicit language of Article 1425 and the unanimous authorities and legislative history and found that the "plain meaning" of the statute made it applicable to financing agreements such as the Dopp/Yari Agreement. However, the plain meaning of Article 1425 is consistent with its 1,500-year history and does not create, as the First Circuit does, inherent contradictions such as (a) holding that the nine-day period for tender only applies to certain sales and not to others, and (b) finding that a defendant may extinguish a plaintiff's claim without paying to the "assignee" the full, bargained-for price. The First Circuit's characterization of "plain meaning" cannot be used to justify such unwarranted and unintended extension of the statute. *Hernandez-Colon v. Secretary of Labor*, 835 F.2d 958, 960 (1st Cir. 1987); *Town of Belmont v. Dole*, 766 F.2d 28, 33 (1st Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

Both the District Court and First Circuit derived their respective decisions based upon the premise that a "litigated credit" is "the interest of a third-party who has purchased a stake in the outcome of civil litigation." However, where the foundation is weak, the entire structure may fall. Article 1425's use of the term "litigated credit" refers to a plaintiff's (the "assignor's") claim against the defendant (the "debtor"). It does not refer to a third-party's right to receive payment from the plaintiff out of the monies awarded as damages in a litigation.

Fundamental under the Civil Code of Puerto Rico and the common law is the distinction between a party's assignment to a third-party of a claim against a debtor and a party's agreement to pay a third-party out of the funds the party receives from the debtor.[1] When a claim is assigned, the assignee has the power to make demand on the debtor for payment.[2] When the "assignee" only receives a right to be paid by the plaintiff out of the proceeds of the litigation, the assignee may not make a demand on the debtor for payment. *Consejo de Titulares v. Urban Renewal and Housing Corp.*, 93 J.T.S. 25 (1993) (Slip Opinion at 5-6); *IBEC v. Banco Commercial*, 117 P.R. Dec. 371, 376-77 (1986). The "assignee" may only look to his "assignor" (the party with whom he contracted) for payment.

Because Article 1425 applies only to assignments of claims with the concomitant right to make demand on the debtor and

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[1] *Promises to Assign or to Pay out of a Particular Fund Are Not Assignments*. Thus, a promise to an attorney that he shall have as his compensation a certain share or payment out of a fund in litigation creates a valid partial assignment if the attorney is to collect the claim and pay himself by retaining his fee, whereas, if the fund is to come into the hands of the client, and he is to make the payment, there is only a contract right. 3 Williston on Contracts § 428, p. 163 (3d ed. 1994).

[2] What characterizes an assignment of a credit is "(1) that a new creditor replaced the old creditor, taking the same place which the latter had in the obligation and (2) that the obligation remains the same." III J. Castan Tobenas, *Derecho Civil Espanol, Comun y Foral*, p. 323 (1978). Other Civil Law authorities are unanimous on this point. Puig Brutau defines the assignment of a credit as "an assignment whereby one of the parties, the assignor, transfers the credit to the other party, the assignee, so he [the assignee] would have the right to demand payment from the debtor of the sums owed to the assignor." II J. Puig Brutau, *Fundamentos de Derecho Civil*, 225 (1982). An assignment transfers title to the credit to the assignee, who then substitutes the assignor in relation to that credit. *See*, Eduardo Vasquez Bote, *Derecho Civil de Puerto Rico*, Book III, Vol. I at 319 (1973); XXIII-1 Q. M. Scaevola, *Codigo Civil*, 667-668 (2d. Ed. 1970); Luis Diez Picazo, *Fundamentos del Derecho Civil Patrimonial*, Vol. I, at 789 (1979); J.M. Manresa y Navarro, *Commentarios at Codigo Civil Espanol*, Book X, at 404.

pursue him through the litigation,[3] and not to a mere interest in proceeds, the statute provides that the nine-day period within which the debtor must invoke his right of redemption runs from "the day the assignee should demand payment from him," not the day that a third-party enters into a contract entitling him to payment by the plaintiff out of the proceeds of the litigation.

The courts below have rewritten Article 1425 to apply not only to litigated credits, but also to an assignment of the proceeds of litigation. Such an expanded scope would render even an attorney's contingency fee arrangement subject to redemption and extinguishment. The basis for such expanded interpretation is not found in the plain language of Article 1425 and flies in the face of the precept of statutory construction that the legal terms used in a statute are presumed to have been intended to convey their customary meaning. *United Technologies v. Browning-Ferris Industries*, 33 F.3d 96, 99 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1176 (1995); *U.S. v. Holmquist*, 36 F.3d 154, 159 (1st Cir. 1994); *Baez v. INS*, 41 F.3d 19 (1st Cir. 1994), *petition for cert. filed* (Dec. 27, 1994); *Laracuente v. Chase Manhattan Bank*, 891 F.2d 17, 23 (1st Cir. 1989).

It is understood that courts "further legislative goals by filling the interstitial silences within a statute." However, the judiciary is "not accredited to supersede [the legislature] or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 63 L.Ed.2d 22, 100 S.Ct. 790 (1980). The methods employed to further such legislative goals include resort to related statutes, legislative history or administrative provisions. Accordingly, the courts below were obligated to examine the 1,500 years of cases and

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[3] This is consistent with the historical purpose of Article 1425 as analyzed by the courts and commentators.

authorities interpreting them and their predecessors (which were proffered by Yari). *See* Point III, *infra*. Analysis of such precedent and history confirms the plain meaning—that Article 1425 does *not* apply to a promise to pay money out of the proceeds of a litigation. In fact, in the fifteen hundred year history of the statute, there is not a single recorded instance of the statute or its antecedents being applied to such a promise or an assignment of proceeds. In every case, it applied only to a outright sale or assignment of the plaintiff's claim (credit) against the debtor.

II.

ARTICLE III, SECTION I, OF THE UNITED STATES CONSTITUTION PROHIBITS THE JUDICIARY BRANCH FROM PERFORMING LEGISLATIVE FUNCTIONS

The courts below, by choosing to ignore the plain meaning of Article 1425 and apply the statute to a financing arrangement, violated Article III, Section I, of the Constitution which prohibits the judiciary from performing legislative functions.

Article 1425 is not intended to apply to the Dopp/Yari Agreement. Article 1425, by its terms, applies to the sale of a "litigated credit" to a party designated as an "assignee." The Dopp/Yari Agreement does not contain any language either selling or assigning to Yari Dopp's claims against Pritzker.[4] Yari has no right or title to Dopp's claims against Pritzker. Yari has no right to demand payment from Pritzker. All that Yari has is Dopp's promise to repay him (for funds, advice and consultation provided) out of the proceeds, if any, recovered in the Dopp/Pritzker Litigation.

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[4] In fact, the Dopp/Yari Agreement required Dopp to assign his claims in the Dopp/Pritzker Litigation as collateral to the bank issuing the line of credit. Unfortunately for Dopp, a line of credit could not be obtained.

A. Article 1425 Requires A Transfer of Title to a Litigious Credit

In holding there is no requirement for a transfer of title, the First Circuit simply stated that "[n]o mention is made of a transfer-of-title requirement." *Pritzker v. Yari*, 42 F.3d 53, 66 (1st Cir. 1994). However, Article 1425, by its own terms, is only applicable to the sale or assignment of a litigious credit—which inherently requires a transfer of title.[5]

In *Consejo de Titulares*, *supra*, the Supreme Court of Puerto Rico, analyzing Article 1425, explained the meaning of an assignment of a credit. The Supreme Court stated that an assignment of a credit is " 'a legal business executed by the assignor with another person, the assignee, by virtue of which the former transfers to the latter the ownership of the right of the assigned credit.' L. Diez Picazo, *Fundamentos del Derecho Civil Patrimonial*, Madrid, Ed. Tecnos 1979, Vol. I, p. 376." *Consejo de Titulares*, *supra*, at 5. The Civil Code of Puerto Rico states that "[t]he sale or assignment of a credit includes that of all the accessory rights, such as security, mortgage, pledge or privilege." 31 L.P.R.A. § 3943. Put another way, the effect of an assignment of a credit is to install the assignee in the same position as the assignor with respect to the debtor. *Consejo de Titulares*, *supra*.[6]

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[5] Article 1425 states that when "a litigious credit is *sold* the debtor shall have the right to extinguish the same by reimbursing the *assignee* . . ." (Emphasis added).

[6] The Dopp/Yari Agreement does not contain any language selling or assigning to Yari Dopp's claims against Pritzker. The Dopp/Yari Agreement does not sell or assign to Yari any rights to demand payment by Pritzker. Accordingly, Yari never made any such demand (because he was not so entitled) and never was a party to, or had the right to participate in, the Dopp/Pritzker Litigation. The Dopp/Yari Agreement contains a promise by Dopp to pay Yari a portion of any proceeds collected in the Dopp/Pritzker Litigation in exchange for Yari's promise to provide litigation funding, advice and consultation. The Dopp/Yari Agreement is, at most, a promise by Dopp to pay Yari out of a fund to be collected in the future.

For centuries, the existence of a sale, assignment or other transfer of title for the purpose of bringing about a substitution of creditors has uniformly been held essential for triggering Article 1425 and its predecessors. Troplong, *Le Droit Civil Explique De la Vente*, Bruxelles, 1841, p. 520; Marcade, *Explication du Code Napoleon*, Paris, 1855, t. 6, p. 341; Laurent, *Principes de Droit Civil*, Bruxelles, 2d ed., 1876, p. 573; Beudant, *Cours de Droit Civil Francais*, Paris, t. XI, 2d ed., 1938, p. 326; Mazeaud et Mazeaud, *Lecons de Droit Civil*, Montchrestien, 1978, 6th ed., t. 2, vol I, p. 1276; Plainiol, *Traite Elementaire de Droit Civil*, Paris, 11th ed., 1935, t. 2, p. 603; Aubrey et Rau, *Droit Civil Francais*, Libraires Techniques, Paris, 1952, 6th ed., p. 177; Ripert et Boulanger, *Traite de Droit Civil*, Paris 1958, t. III, p. 535; Albaladejo, ed., *Commentarios al Codigo Civil y Compilaciones Forales*, Madrid, 1980, t. XIX, p. 701.

A recent text, dedicated entirely to the complexities of the Spanish equivalent of Article 1425, emphasized the requirement for an actual transfer to a third party of the credit. The text explains if the seller even retains possession of the claim sold, then there is no right of redemption. Navarro Perez, *El Retracto de Creditos Litigiosos*, Grenada, 1989, pp.88-89.

Notwithstanding that Article 1425 does not contemplate application to a financing agreement, the First Circuit flat-out refused to consider proffered legislative history and analogous statutory materials which demonstrate the meaning of the statute. Notwithstanding the District Court's proclamation that "The Dopp/Yari Agreement is far outside the heartland of agreements contemplated by the legislature," *Dopp v. HTP Corp.*, 831 F. Supp. 939, 948 (D.P.R. 1993), the First Circuit refused to consider these relevant and essential materials, gave no explanation or rationale for its decision, and cursorily concluded that Article 1425 "is unambiguous" and applied to the Dopp/Yari Agreement. *Pritzker v. Yari*, 42 F.3d 53, 67 (1st Cir. 1994).

The lower courts' refusal to consider proffered legislative history, analogous statutes and relevant commentary was error—especially in light of their finding that the Dopp/Yari Agreement is outside the intended scope of Article 1425.

B. The Courts Below Judicially Eradicated the Last Sentence of Article 1425

The decisions of the First Circuit and District Court remove all meaning from the third sentence of Article 1425 which provides:

> [T]he debtor may make use of his right within nine (9) days counted from the day the assignee should demand payment from him.

31 L.P.R.A. § 3950 (1994). This provision, by its unambiguous terms, requires that the assignee (in this case, Yari) first have the right to demand payment from debtor/defendant (Pritzker). Yari never had this right. He only had the ability at the conclusion of the litigation to make a demand on Dopp for payment.[7] As the First Circuit itself held "Courts should not lightly read entire clauses out of statutes, but should, to the exact contrary, attempt to give meaning to each word and phrase." *U.S. v. Flores*, 968 F.2d 1366, 1371 (1st Cir. 1992).

The statutory prerequisite of Article 1425 that the assignee possess the right to make demand upon the debtor is crucial to the policy considerations underlying Article 1425. It serves the necessary function of distinguishing between financing vehicles, where title to the claim and the right to make demand on the debtor remain with the plaintiff, and sales of litigious credits where the purchaser is now "pursuing with fury the debtor." Castan Tobenas, Reus 1988, p. 350.

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[7] In fact, if Dopp had settled with Pritzker or recovered a judgment and failed to pay Yari the proceeds due him, then Yari's sole claim would have been against Dopp, not Pritzker.

There are two underlying purposes to Article 1425. The first is to shield debtors from "persecution by professionals who do not shrink from employing any means to obtain payment" of the debt. Mazeaud et Mazeaud, *Lecons de Droit Civil*, Ed. Montchrestien, Paris, 8th ed. (par habas) 1991, p.1276. *See* M. Troplong, *Le Droit Civil Explique-De La Vente*, Bruxelles, 1941, p. 520. The second purpose is to bring litigation to a close. Ch. Beudant, *Cours de Droit Civil Francais*, Paris t. XI, 2d ed., 1938, p. 327; *Clement v. Sneed Bros.*, 116 So. 269 (1960); G. Baudry-Lacantinerie, *Traite Theorique et Pratique de Droit Civil*, Paris, 13th ed., vol XIX (*De la Vente et de L'Exchange*), 1908, p. 934; A. Vigie, *Droit Civil Francais*, Paris, 3d ed., t. X, 1905, p. 960; F. Laurent, *Principes de Droit Civil*, Bruxelles, 1876, 2d ed., vol. 24, p. 574; M. Troplong, *Le Droit Civil Explique – De la Vente*, Bruxelles, 1841, p. 506. Neither purpose is fulfilled by the lower courts' extension of Article 1425 to encompass the Dopp/Yari Agreement.

By applying Article 1425 to the Dopp/Yari Agreement, the courts below have "legislated out" the requirement that the assignee have the right to make demand on the debtor for payment. This was error.

C. The Requirement of a Fixed Price Makes Article 1425 Inapplicable to the Dopp/Yari Agreement

For a litigious credit to be redeemed, Article 1425 requires that the debtor reimburse the assignee the price paid, plus interest and judicial costs. The courts below also "legislated out" the requirement that a price be fixed. When a party agrees to finance a lawsuit, the cost of that financing is inherently undeterminable until the litigation is complete. Indeed, Pritzker attempted, and then relented, to apply Article 1425 to the contingency fee interest of Dopp's attorneys. Pritzker himself realized that any attempt to redeem the contingency fee would illustrate the extreme breadth given by the courts below to Article 1425. The same policy arguments which per-

mit contingency fees justify exclusion from Article 1425 of financing agreements (such as the Dopp/Yari Agreement).

In 1992, the Court of Appeals of Louisiana, applying a provision of its Civil Code similar to Article 1425, stated:

> In *Charrier*, the court noted that the LSA-C.C. art. 2652 speaks of interest on the real price which leads to the conclusion that redemption *should only apply to transfers made in return for the payment of a certain or determinable amount of money.*

Martin Energy v. Bourne, 598 So.2d 1160, 1162 (1992); *see Charrier v. Bell*, 380 So.2d 155, 156 (La. App. 1979).[8] Authorities on the requirement of a fixed price are plentiful.[9]

The main purpose of the Antastasian[10] redemption device is to provide a way for an abused debtor to bring about the immediate termination of a lawsuit. That is why, for example, *quota litis* arrangements are not subject to redemption. The cost of the financing, as in the present case, is unknown until the litigation ends. *See*, Baudry-Lacantinerie, *loc. cit*; Colin et Capitant, *supra*, at p. 647. Thus, the Supreme Court of Spain held that executory contracts are beyond the pale of the statute. *S. de 4 de Ferero de 1952*, Aranzadi, No. 476.

Accordingly, because the Dopp/Yari Agreement was dynamic in its requirement that Yari fund the Dopp/Pritzker litigation on an ongoing basis, the lower courts' application

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[8] The First Circuit repeatedly referred to Louisiana law to support its position, but inexplicably ignored the two cases directly on point.

[9] Baudry-Lacantinerie, *Traite Theorique et Pratique de Droit Civil (De la Vente et l'Echange)*, Paris, 1908, 13th ed., p. 947; Colin et Capitant, *Cours Elementaire de Droit Civil*, Dalloz, Paris, 1953, 10th ed., t. 2, p. 645; Alabaladejo ed., *Commentarios al Codigo Civil v. Complicaciones Forales*, Madrid, 1980, t. XIX, p.754; Borrell y Soler, *Derecho Civil Espanol*, Barcelona 1953, t. 3, p. 201.

[10] The genesis of Article 1425 is a decree of the Emperor Anastasius in 506 A.D.

of Article 1425 to this arrangement constitutes unconstitutional legislating.

III.

THE FIRST CIRCUIT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WARRANTS GRANTING A WRIT OF CERTIORARI

The lower courts' collective venture into the legislative arena—essentially rewriting Article 1425—ignores the significant cases and authorities that are the foundation of Puerto Rico's Civil Code. This practice so far departs from the accepted and usual course of judicial proceedings—in particular the Supreme Court's repeated instructions on the deference due to Civil Law history and authorities—that this Court's review is warranted.

The First Circuit acknowledges, and then ignores, its obligation to adhere to the well-established doctrine of *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny. The Court explicitly stated:

> Our unwillingness to rely upon extra-textual sources in this instance is reinforced by our reservations about the historical-exegetical enterprise advocated by the financiers. From a practical standpoint, we question the wisdom and utility of invoking ancient doctrines, gleaned from the writings of long-deceased expositors, as a means of interpreting statutes to govern the present day and age.

Pritzker v. Yari, 42 F.3d 53, 67 (1st Cir. 1994).

This is a distressing statement, reminiscent of days long gone when unfamiliarity with Civil Law sources provoked peremptory dismissal of their consideration. To set matters straight, a good many of the "long-deceased expositors" are

alive and well. Many others have authored well-known treatises that are kept up to date in successive editions by prominent scholars. Both the Spanish and French authorities cited are referred to constantly in opinions of the Supreme Court of Puerto Rico—even when interpreting the plainest of code provisions. These doctrinal writings are essential to a proper understanding of Civil Law questions.

Early this century, prior to this Court's decision in *Erie*, the federal courts dealing with the law of Puerto Rico would remodel the law pursuant to common-law conceptions. The courts would then substitute their judgment for that of local courts—often departing from intentions attested by persons steeped in the civil tradition. This practice was censured by the United States Supreme Court on several occasions. *See De Villanueva v. Villanueva*, 239 U.S. 293 (1915); *Nadal v. May*, 233 U.S. 447, 454 (1914).

Upon continuation of the practice, Justice Holmes, speaking for the Court in *Diaz v. Gonzalez*, 261 U.S. 102 (1923), stated:

> This court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. . . . This is especially true in dealing with the decisions of a court inheriting and brought up in a different system from that which prevails here. *When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.* . . . Our appellate jurisdiction was not given for the purpose of remodeling the Spanish-American law according to common-law conceptions

> except as so far as that law has to bend to the express will of the United States.

Diaz v. Gonzalez, 261 U.S. 102, 105-106 (1923) (emphasis supplied). Mere "lip service" to the rule will not suffice. *Bonet v. Texas Co. (P.R.)*, 308 U.S. 463, 470-71 (1940); *see also*, *Bonet v. Yaburod Sugar*, 306 U.S. 505, 509-10 (1939).

Since the 1940's, this Court has expanded these rules concerning the deference due to local decisions and the need to consult civil law sources when exercising diversity jurisdiction. In other words, deference is due not only to actual local holdings on the meaning of the laws of Puerto Rico, but also to the techniques used for interpreting said laws. The First Circuit, itself has held

> We believe it appropriate in diversity cases arising in Puerto Rico for federal courts to consult civil law sources that in large measure constitute the basis of the Commonwealth's own law—the law that we are bound to follow. *See Erie* . . . . Obviously, the fact that these sources are relatively unfamiliar to federal appellate courts and often unavailable in English can create problems. But, these problems are not insuperable. For one thing, when a question is open under the law of Puerto Rico, federal courts can certify the question to the Supreme Court of Puerto Rico for resolution. . . ."

Reyes Cardona v. J.C. Penney Co., Inc., 694 F.2d 894, 896-97 (1st Cir. 1982); *see Republic Sec. Corp. v. P.R.A.S.A.*, 674 F.2d 952, 958 (1st Cir. 1982) (Breyer); *Federal Insurance v. Banco de Ponce*, 751 F.2d 38, 40 (1st Cir. 1984) (Breyer); *St. Paul Fire and Marine Ins. Co. v. Caguas Federal Savings & Loan Association*, 825 F.2d 536 (1st Cir. 1986) (Campbell).

A plethora of cases illustrate the importance which the Supreme Court of Puerto Rico attaches to the historical element as an indispensable means of ascertaining a law's purpose, evolution through time and its place within a given

social context. *See Romero Soto v. Morales Layoy*, 93 CDT 160, *Avala Rosa v. Autoridad de Tierras*, 116 P.R. Dec. 337 (1985); *De Jesus Martinez v. Chardon*, 116 P.R. Dec. 238 (1985); *Toppel v. Toppel*, 114 P.R. Dec. 775 (1983); *Canales Delgado v. Pan American Airways*, 112 P.R. Dec. 329 (1982); *Roman & Cia v. Negron Crespo*, 109 P.R. Dec. 26 (1979). In these and many other cases the particular court found it necessary to go back in time and consider the experience of other societies with analogous laws to determine the precise and intended meaning of the Civil Code of Puerto Rico. In 1930, the Legislative Code Commission of Puerto Rico matched up sections of the Civil Code of Puerto Rico with sections of the Spanish and Louisiana Codes to enable the courts of Puerto Rico to refer easily to the analogous foreign law provisions while interpreting the Civil Code. *See* Commentary to 31 L.P.R.A. § 1.

The First Circuit blindly relied on "plain meaning"—pointing to no legal authority—to justify its flawed understanding of Article 1425 notwithstanding the abundant scholarly writings and case law uniformly pointing the other way. Thus, this Court should resolve the true, intended meaning of Article 1425 and its application, if any, to the Dopp/Yari Agreement.

IV.

THIS CASE CONCERNS AN ISSUE OF EXCEPTIONAL IMPORTANCE

The First Circuit recognized that "the engine of high-stakes litigation runs on money." *Pritzker v. Yari*, 42 F.3d 53, 57 (1st Cir. 1994). However, the First Circuit and the District Court have held that a plaintiff may not use the potential proceeds of his action to raise financing to maintain the litigation. This ruling, in essence deprives the plaintiff, Dopp, who has litigated and received a favorable ruling on liability, continued access to the judicial process. In essence, the courts

below recognized the vast disparity between Dopp's financial resources and those of Pritzker ("a billionaire who could never be forced to relent in his defense") and allowed Pritzker's vast wealth to tip the scales of justice.

In addition, the lower courts' holdings pose a threat to the continued validity of one of the fundamental vehicles that enable litigants to obtain legal representation—the contingency fee. These fee arrangements are nothing more that an attorney's promise to provide services in exchange for an assignment of the proceeds of a litigation. Under the lower courts' holdings, a defendant may extinguish significant portions of his liability by tendering litigation costs. Article 1425 should not be so interpreted.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

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APPENDIX

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 93-2374, 94-1128, 94-1129

JAY A. PRITZKER,

Plaintiff, Appellee,

—v.—

BOB YARI, ET AL.,

Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr., *U.S. District Judge*]

Before

Selya and Cyr, *Circuit Judges*,
and Zobel,* *District Judge*.

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* Of the District of Massachusetts, sitting by designation.

Roger R. Crane, with whom *Bachner, Tally, Polevoy & Misher*, *Roberto Boneta*, *Munoz Boneta Gonzalez Arbona Benitez & Peral*, *Jose Trias-Monge*, and *Trias & Melendez* were on brief, for defendant Bob Yari.

Martin I. Kaminsky, with whom *W. Hans Kobelt* and *Pollack & Kaminsky* were on brief, for defendant Baird, Patrick & Co.

Benjamin Rodriguez-Ramon, *Rodriguez-Ramon & Rodriguez-Hernandez*, and *Emigdio R. Seles* on brief for defendant Lincoln Realty, Inc.

Ruben T. Nigaglioni, with whom *Diana Mendez-Ondina* and *Ledesma, Palcu & Miranda* were on brief, for defendant Paul S. Dopp.

Gael Mahoney, with whom *Frances S. Cohen*, *David A. Hoffman*, *Joshua M. Davis*, *Hill & Barlow*, *Salvador Antonetti-Zequeira*, *Ricardo Ortiz-Colon*, and *Fiddler, Gonzalez & Rodriguez* were on brief, for plaintiff Jay A. Pritzker.

December 13, 1994

SELYA, *Circuit Judge*. In this troika of appeals, we address several questions arising collaterally from a bitterly fought breach-of-contract suit between Paul S. Dopp and Jay A. Pritzker (the D/P Litigation) concerning the ownership of two hotels, situated on approximately 1,000 beachfront acres, in the Commonwealth of Puerto Rico. The engine of high stakes litigation runs on money, and at various times during the course of the D/P Litigation Dopp forged financing agreements with three different financiers, namely, Bob Yari, Lincoln Realty, Inc. (Lincoln), and Baird, Patrick & Co. (BPC), for the apparent purpose of fueling his prosecution of the suit.

Although we first must address BPC's jurisdictional challenge, our principal task today is to resolve the contested legal status of these financing agreements. Having carefully

examined the relevant law and the facts of the case, we hold that all three financing agreements involve "litigated credits" within the meaning of article 1425 of the Civil Code of Puerto Rico, P.R. Laws Ann. tit. 31, § 3950 (1991); that all are, therefore, subject to redemption by Pritzker under Puerto Rico law; and that Pritzker properly perfected his rights to redemption. We also hold that the lower court's trimming of Pritzker's right to redeem Yari's litigated credit lacked any legal basis. Consequently, we affirm in part and reverse in part.

I. BACKGROUND

The facts relating to the underlying breach of contract and the protracted litigation emanating from it are chronicled in a series of opinions, *see Dopp* v. *Pritzker*, ___ F.3d ___, ___ (1st Cir. 1994) [Nos. 93-2373, 94-1130, & 94-1131, slip op. at 3-6]; (*Dopp IV*); *Dopp* v. *HTP Corp.*, 947 F.2d 506, 508-09 (1st Cir. 1991); (*Dopp II*); *Dopp* v. *HTP Corp.*, 831 F. Supp. 939. 941-92 (D.P.R. 1993) (*Dopp III*); *Dopp* v. *HTP Corp.*, 755 F. Supp. 491, 492-94 (D.P.R. 1991) (*Dopp I*), and need not be rehearsed. Hence, we confine our account to the facts that are needed to place the instant appeals into workable perspective.[1]

A. *The Financing Agreements.*

In March 1990, a jury sitting in the United States District Court for the District of Puerto Rico found Pritzker liable to Dopp in the sum of $2,000,000 for breach of an oral contract concerning the purchase of the Dorado Beach Hotel Corpo-

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[1] For purposes of oral argument, we consolidated the financiers' appeals with three other appeals—two taken by Pritzker and one by Dopp—involving the remedial phase of the main litigation. We resolved most of the points raised in Pritzker's and Dopp's appeals by means of a separate opinion issued on October 28, 1994. *See Dopp IV, supra*. In this opinion, we deal with not only the financiers' appeals but also the complaints voiced by Pritzker and Dopp concerning the district court's rulings anent the financing agreements.

ration (DBHC). The district court entered judgment in the D/P Litigation, *see Dopp I*, 755 F. Supp. at 504, and a firestorm of appeals ensued. We eventually upheld the liability finding but vacated the damage award and ordered a new trial limited to questions of remediation. *See Dopp II*, 947 F.2d at 520.

As these events were unfolding, Dopp launched a collateral enterprise, assigning various portions of the anticipated proceeds of the D/P Litigation to third parties. He undertook this effort, in his words, "to meet some of the litigation and personal expenses . . . incurred during the years of this intense litigation and in connection therewith." All told, Dopp entered into three separate nonuniform financing agreements with three distinct financiers.

Dopp signed the first financing agreement, styled as a "Judgment or Settlement Purchase Agreement," on June 26, 1990. In this transaction, Lincoln agreed to provide $50,000 in exchange for an 8% interest in the proceeds of the D/P Litigation above a stipulated floor. The agreement obliged Dopp to apprise Lincoln of developments in the litigation on a current basis.

Dopp entered into the second financing agreement on October 16, 1991. In it, BPC agreed to provide $100,000 in exchange for a 5% interest in the proceeds of the D/P Litigation over a floor different from that negotiated between Dopp and Lincoln. Moreover, the BPC agreement mandated certain minimum repayments to the financier. These minima varied depending upon the date on which, in the words of the contracting parties, the D/P litigation might eventually be "settled or otherwise decided." Like the Lincoln agreement, the BPC agreement obliged Dopp to keep the financier seasonably informed of litigatory developments.

Dopp entered into the third and last financing agreement on July 23, 1992. In consideration of $250,000 in cash and a promise to obtain, or at least to assist in obtaining, a $2,500,000 to $3,000,000 line of credit for one year, Dopp agreed to allocate the remainder of the proceeds of the D/P Litigation according to a preset formula: "(i) first, to repay-

ment of all indebtedness in relation to the line of credit to have been obtained in Dopp's name; (ii) second, $2,500,000 to Yari; (iii) third, $12,000,000 to Dopp, (iv) fourth, $7,000,000 to Yari; and (v) fifth, the remaining amount, if any, to be divided equally between Dopp and Yari." *Dopp III*, 831 F. Supp. at 954.[2] The Yari agreement also set in place virtual joint control of the litigation. Although Yari ultimately provided less funding (somewhere between $500,000 and $625,000) than Dopp claims was due, the district court found that Yari "complied with all of his obligations under his agreements . . . ." *Id.* at 956.

B. *Pertinent Proceedings Below.*

On October 9, 1992, Dopp disclosed the existence of the financing agreements in the midst of a new discovery round. Exactly one week later, Pritzker wrote to Lincoln, offering to tender the amount paid to Dopp in exchange for Lincoln's rights and beneficial interests under its financing agreement. On the same date, Pritzker sent substantially identical missives to BPC and Yari,[3] and notified the district court of his letter-writing spree.

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[2] On September 24, 1992, Dopp and Yari entered into a written modification of their agreement. The amendment is only peripherally related to the issues we must decide today. To the extent it is relevant, we discuss it in Part III(D), *infra*.

[3] Pritzker made the three tenders pursuant to article 1425 of the Civil Code of Puerto Rico, which provides in its entirety:

> When a litigated credit is sold, the debtor shall have the right to extinguish the same by reimbursing the assignee for the price the later [sic] paid for it, the judicial costs incurred by him, and the interest on the price from the day on which the same was paid.
>
> A credit shall be considered as litigated from the day the suit relating to the same has been answered.
>
> The debtor may make use of his right within nine (9) days, counted from the day the assignee should demand payment of him.

P.R. Laws Ann. tit. 31, § 3950 (1991).

When his communiques drew no meaningful response, Pritzker promptly filed a complaint in the district court. He named Dopp and the three financiers as defendants, along with an ostensible partnership between Dopp and Yari. Pritzker averred that each of the financing agreements involved the sale of a litigated credit within the meaning of article 1425 and, hence, was subject to extinguishment. Between December 18, 1992, and June 1, 1993, Pritzker, through a series of motions, deposited with the district court the funds that he believed were necessary to redeem the financiers' interests in the proceeds of the D/P Litigation.

BPC moved to dismiss Pritzker's complaint against it for want of *in personam* jurisdiction, but the district court demurred.[4] After all defendants had answered the complaint, the court consolidated Pritzker's suit with Dopp's suit against Pritzker. *See id.* at 942-43. In an opinion dated March 5, 1993, the court held that all three financing agreements involved litigated credits within the reach of article 1425, and that Pritzker was entitled, pursuant to that statute, to extinguish such credits through full reimbursement of the amounts advanced (together with interest and costs). *See Pritzker* v. *Yari*, Civ. No. 92-2825, 1993 WL 71760, at *5-7, slip op. at 11-17 (D.P.R. Mar. 5, 1993). In a later, end-of-case opinion, the court reaffirmed this holding, *see Dopp III*, 831 F. Supp. at 952, carved out a partial exception applicable to Yari, *see id.* at 957-58, and determined the monetary amounts each party stood to lose or gain, *see id.* at 958-59.

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[4] BPC's motion stressed that it is a New York corporation transacting no routine business in Puerto Rico; that it has never had an office or agent in Puerto Rico; that Dopp and BPC signed the financing agreement in New York; that Dopp is a citizen and resident of New Jersey; and that Pritzker is a citizen and resident of Illinois. The district court found these facts, by and large, to be accurately stated. *See Pritzker* v *Yari*, Civ. No. 92-2825, 1993 WL 71760, at *3, slip op. at 6 (D.P.R. Mar. 5, 1993) The court added, however, "that the agreement [BPC] entered into with Dopp involved the purchasing of an interest in a case being tried in the District of Puerto Rico and that BPC has manifested a continuing interest in the conduct of the litigation." *Id.*

Following the entry of final judgment, the three financiers filed notices of appeal. Lincoln and Yari contested the application of article 1425 to their agreements. BPC piggybacked on this argument, but focused its appeal mainly on jurisdictional questions. Dopp joined the chorus, but, as he contributed no arguments that were both novel and substantial, we subsume his views in our ensuing discussion of the financiers' points on appeal. Pritzker cross-appealed, excoriating the district court's determination that he could redeem only one-half of Yari's litigated credit.

II. PERSONAL JURISDICTION

Before proceeding to the main event, we must first jump through a jurisdictional hoop and determine whether the district court properly exercised *in personam* jurisdiction over BPC. The hoop does not present an impenetrable obstacle.

A. *Charting a Course.*

In its simplest formulation, *in personam* jurisdiction relates to the power of a court over a defendant. It is of two varieties, general and specific. General personal jurisdiction, as its name implies, is broad in its ambit: it is the power of a forum-based court, whether state or federal, over a defendant "which may be asserted in connection with suits not directly founded on [that defendant's] forum-based conduct . . . ." *Donatelli* v. *National Hockey League*, 893 F.2d 459, 462-63 (1st Cir. 1990). Put another way, "[g]eneral jurisdiction exists when the litigation is not directly founded on the defendant's forum-based contracts, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state." *United Elec. Workers* v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1088 (1st Cir. 1992) (*Pleasant St. I*). Specific personal jurisdiction, by contract, is narrower in scope and may only be relied upon "where the cause of action arises directly out of, or relates to, the defendant's forum-based contacts " *Id.* at 1088-89.

Nothing in the record before us suggests that BPC engaged within Puerto Rico in continuous and systematic activity. Since it is the plaintiff's burden to establish facts sufficient to sustain general *in personam* jurisdiction, *see Ticketmaster-New York, Inc.* v *Alioto*, 26 F.3d 201, 207 n.9 (1st Cir 1994); *Dalmau Rodriguez* v. *Hughes Aircraft Co.*, 781 F.2d 9, 10 (1st Cir. 1986), and since Pritzker failed to carry that burden here, we may assume that general jurisdiction is lacking. Our analysis, therefore, focuses exclusively on specific jurisdiction.

The proper exercise of specific *in personam* jurisdiction hinges on satisfaction of two requirements: first, that the forum in which the federal district court sits has a long-arm statute that purports to grant jurisdiction over the defendant; and second, that the exercise of jurisdiction pursuant to that statute comports with the strictures of the Constitution. *See Ticketmaster*, 26 F.3d at 204, *Pleasant St. I*, 960 F.2d at 1086; *Hahn* v. *Vermont Law Sch.*, 698 F.2d 48, 51 (1st Cir. 1983). We analyze these requirements separately, mindful that, in the circumstances of this case, the second prong of the inquiry necessitates an examination into the sufficiency of the relationship between BPC's contract to finance Dopp's Puerto Rico-based litigation and the exercise of jurisdiction over BPC by the Puerto Rico-based federal district court.

B. *The Long-Arm Statute.*

The requirement that the forum have a long-arm law of appropriate reach is easily satisfied here. A Puerto Rico statute provides in pertinent part that a Puerto Rico-based court may take jurisdiction over a person not domiciled in Puerto Rico "if the action or claim arises because said person . . . transacted business in Puerto Rico personally or through an agent . . . ." P.R. Laws Ann. tit 32, app. III, R.4.7(a)(1) (1984 & Supp. 1989). We have concluded before, and today reaffirm, that this statute extends personal jurisdiction as far as the Federal Constitution permits. *See Dalmau Rodriguez*, 781 F.2d at 12 (citing *A.H. Thomas Co.* v. *Superior Court*, 98

P.R.R. 864, 870 n.5 (1970)); *Manqual* v. *General Battery Corp.*, 710 F.2d 15, 19 (1st Cir. 1983).

C. *Due Process.*

The second requirement—that the exercise of jurisdiction fall within constitutional bounds—presents a more intricate puzzle. Whether or not BPC "transacted business" within the meaning of the long-arm statute depends on whether the requisite minimum contacts can be attributed to it. By its very nature, the inquiry into minimum contacts is far from exact: "the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 319 (1945). The inquiry into minimum contacts is also highly idiosyncratic, involving an individualized assessment and factual analysis of the precise mix of contacts that characterize each case. *See Pleasant St. I*, 960 F.2d at 1088; *Hahn*, 698 F.2d at 51.

To sharpen the logic of the personal jurisdiction inquiry, we have developed a tripartite analysis:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's court foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Pleasant St. I, 960 F.2d at 1089; *see also Ticketmaster*, 26 F.3d at 206; *Pizarro* v. *Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1258 (1st Cir. 1990). A careful application of these three elements to the facts at hand demonstrates that the exercise of *in personam* jurisdiction over BPC, for the specific

purpose of determining the legal status of its agreement with Dopp, does not offend constitutional principles.

1. *Relatedness.* The element of relatedness is not difficult to satisfy here. For one thing, the relatedness test is, relatively speaking, a flexible, relaxed standard. *See Ticketmaster*, 26 F.3d at 207. For another thing, it is self-evident that the dispute between Pritzker and BPC over the legal status of BPC's contract with Dopp would not have arisen but for that contract. Because the very document that represents BPC's forum-related activity is itself the cause and object of the lawsuit, this activity comprises the source and substance of, and is thus related to, Pritzker's squabble with BPC. *See Pleasant St. I*, 960 F.2d at 1089.

2. *Purposeful Availment.* We must next determine whether BPC's Puerto Rico-based contacts "represent a purposeful availment of the privilege of conducting activities in [Puerto Rico], thereby invoking the benefits and protections of [its] laws and making the defendant's involuntary presence before [the Puerto Rico-based] court foreseeable." *Id.*

The path of inquiry is neither long nor winding. It necessarily begins with *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957). There, the Court ruled that a California court could properly exercise jurisdiction over an out-of-state insurer in a suit brought by a beneficiary of a policy written by the insurer at the behest of a California resident, even though the insurer had no office or agent in California and had never performed any other business in that state. The *McGee* Court articulated a principle of marked importance for our purposes: in order to be subject to the jurisdiction of the forum state, a nonresidence need have only one contact with the forum, so long as the contact is meaningful. *See id.* at 223 ("It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."). Accordingly, *McGee* stands for the proposition that "minimum contacts" is not necessarily a numbers game; a single contract can fill the bill.

For our purposes, *McGee* remains good law.[5] In *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1984), the Court, citing *McGee*, affirmed the principle that "even a single act can support jurisdiction." *Id.* at 415 n.18. In that case, the Justices held that a court sitting in Florida properly could exercise jurisdiction over a Michigan resident in a suit brought by a Florida corporation for breach of a franchise agreement, even though the defendant's only relationship to the forum state was of a contractual nature. Explaining that "[j]urisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State," *Id.* at 476, the Supreme Court observed that "where individuals 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Id* at 474-75 (quoting *Kulko* v. *California Superior Court*, 436 U.S. 84, 96 (1978)).

These opinions demonstrate that the jurisprudence of minimum contacts casts a wide net, and a nonresident defendant may not always be able to elude the net by such simple expedients as remaining physically outside the forum or limiting contact with the forum to a single commercial transaction.

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[5] The court below expressed some hesitation about relying on *McGee*, fearing that "the broad view of personal jurisdiction articulated in *McGee* was curtailed in the next major Supreme court case dealing with the issue, *Hanson* v. *Denckla*, 357 U.S. 235 (1958)." *Pritzker* v *Yari*, *supra*, at *4, slip op. at 9. This observation is true but beside any relevant point. The *Hanson* Court placed its principal emphasis on the requirement that there be a purposeful act *by the defendant*, and that this requirement may not be satisfied merely by the unilateral act of another. *See Hanson*, 357 U.S. at 253-54. The Court distinguished *McGee* on this basis, and on the ground that *Hanson*, unlike *McGee*, "involve[d] the validity of an agreement that was entered without any connection with the forum State." *Id.* at 252. In the instant case, neither of these problems looms. BPC's decision to enter into the financing agreement was clearly its own, and that agreement, which entitled it to share the proceeds of Puerto Rico-based litigation, bears close ties to the forum.

Rather, courts must look beyond these formalistic measures and evaluate the nature of the contacts and, relatedly, the degree to which they represent a purposeful availment of the forum's protections and benefits.

In the instant case, we conclude that BPC, by knowingly acquiring an economically beneficial interest in the outcome of a Puerto Rico-based lawsuit that involved control over property located in Puerto Rico, necessarily exhibited sufficient minimum contacts to subject it to the district court's exercise of a specific *in personam* jurisdiction. Two considerations in particular lead us to this conclusion.

First, the subject matter of BPC's contact or relationship with Puerto Rico—the consummation of the financing agreement—is such that it can only be characterized as an act of purposeful availment. We think it is doubly significant that the financing agreement directly concerned forum-based litigation, and, in turn, that the litigation directly concerned forum-based real estate. Other than physical presence, we can imagine few contacts that are more integral to a forum than acquiring a financial stake in forum-based litigation concerning forum-based property.[6] The significance that Puerto Rico attaches to such an interest is reflected elsewhere in its long-arm statute, in which land ownership is deemed an independently sufficient basis for exercising personal jurisdiction. *See* P.R. Laws Ann. tit. 32, app. III, R.4.7(a)(5) (extending jurisdiction of Puerto Rico courts over a person who "[o]wns, uses or possesses, personally or through his agent, real property in Puerto Rico").

Second, the specific nature of a contact is also important in discerning the elements of purposeful availment and foreseeability. BPC entered into its financing agreement precisely because it stood to benefit commercially from the eventual

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[6] Indeed, had Dopp succeeded in obtaining resolution (his preferred remedy in the D/P Litigation, *see Dopp IV*, ___ F.3d at ___ [slip op. at 7-17]), he might have wound up with the hotels and the land, and, if so, BPC would presumably have been the equitable owner of a measurable interest in those properties.

outcome of the Puerto Rico-based D/P Litigation. Furthermore, given the location of DBHC's assets and the nature of the remedies potentially available to Dopp, *see Dopp II*, 997 F.2d at 519 (listing alternative remedies), both the extent of BPC's profits and the value of its agreement were closely tied to the integrity and stability of Puerto Rico's economy. This means that the practical importance of BPC's relationship with Puerto Rico was far greater than the importance that could be attached to the random, fortuitous, or attenuated relationships about which the Court has previously voiced concern. *See, e.g., Burger King*, 471 U.S. at 475; *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *World-Wide Volkswagen Corp.* v. *Woodson*, 442 U.S. 286, 299 (1980). Consequently, we believe that BPC's venture represented nothing less than a purposeful availment of the privilege of conducting activities in Puerto Rico.[7]

BPC disagrees with this conclusion. It argues that the singularity of its contact renders the financing agreement quantitatively insufficient as a predicate for the exercise of jurisdiction. This argument fails for two reasons.

In the first place, we do not view BPC's financing agreement as merely a one-time rendezvous with the forum. BPC cannot retract the fact that it backed Dopp's forum-based suit,

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[7] Although we have been unable to find any judicial decision squarely on point, we are reinforced in our conclusion by the results reached in analogous cases. *See, e.g., Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553, 1559-60 (3d Cir.) (finding specific personal jurisdiction over a nonresident who owned stock in a forum-based corporation and who tendered it in accordance with a tender offer, on the ground that the defendant purposefully availed himself of the privilege of having a forum-based court determine his rights and thus involved the benefits and protections of the forum), *cert. denied*, 115 S. Ct. ___ (1994); *Manley* v. *Fong*, 734 F.2d 1415, 1419-20 (10th Cir. 1984) (finding personal jurisdiction over a nonresident in regard to litigation arising out of a contract between the nonresident and a resident, executed out-of-state, for the purchase of an interest in a forum-state oil-and-gas lease); *Quasha* v. *Shale Dev. Corp.*, 667 F.2d 483, 486-89 (5th Cir. 1982) (finding personal jurisdiction over nonresidents in a suit concerning the existence, enforceability, and performance of a contract to purchase mineral interests located in the forum state).

so that its pact can hardly be cracked up to be an act that lacked incessant impact, but, rather, smacked of the exact sort of contact through which jurisdiction, if attacked, might be tracked and should remain intact. A contract conferring an interest in ongoing litigation that touches upon the legal status of real property situated in the forum establishes, by its very nature, a significant relationship with the forum and its legal system. Thus, it is easy to see how such a contact can become a hook on which *in personam* jurisdiction can be hung. *See Burger King*, 471 U.S. at 471 n.18 (noting that "[s]o long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction," and distinguishing this from an "isolated" act in respect to which "the reasonable foreseeability of litigation in the forum is substantially diminished") (quoting *McGee*, 355 U.S. at 223).

In the second place, BPC's emphasis on the *quantitative* aspects of its contact ignores both the contact's *qualitative* aspects and the role of substance, as opposed to mere frequency, in the minimum contacts calculus. So one-sided a view distorts reality. *See International Shoe*, 326 U.S. at 318 (assessing a defendant's acts by "their nature and quality and the circumstances of their commission").

BPC also contends that the exercise of jurisdiction here would be inconsistent with circuit precedent. In this vein, BPC directs our attention to *Pizarro*, a case in which we held that a corporation's placement of nine advertisements in a Puerto Rico newspaper did not create *in personam* jurisdiction for purposes of a tort suit brought by a person who responded to an advertisement, took a trip to the advertised resort, and sustained personal injuries outside of Puerto Rico.[8] *See Pizarro*, 907 F.2d at 1260.

We do not think that *Pizarro* is in any way antithetical to the result we reach today. We decided *Pizarro* based on a lack of relatedness, specifically finding that the advertisements

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[8] Pizarro typifies a line of cases to like effect. *See, e.g., Fournier v. Best W. Treasure Island Resort*, 962 F.2d 126 (1st Cir. 1992); *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986).

had "no connection with the negligent act . . . that allegedly caused the injury," and that, therefore, it could not "be said that the negligent act 'arose out of' [the defendant's] placing of the advertisements . . . ." *Id.* at 1259. Since relatedness is beyond question in the prevent case, *see supra* Part II(C)(1), *Pizarro* is not on point and BPC's reliance on it is mislaid.

3. *The Gestalt Factors.* Having determined that BPC's financing agreement falls within the ambit of sufficient minimum contacts, we proceed to the third and final element of our analysis and inquire whether the exercise of jurisdiction over BPC in the circumstances of this case would, holistically viewed, offend traditional notions of "fair play and substantial justice." *Burger King*, 471 U.S. at 476 (quoting *International Shoe*, 326 U.S. at 320).

Admittedly, "fair play" and "substantial justice" are not the most self-defining of legal formulations. For that reason, we have added the flesh of a five-factor gestalt analysis to these skeletal due process concepts. The factors include:

> (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Pleasant St. I, 960 F.2d at 1088. These gestalt factors are designed to put into sharper perspective the reasonableness and fundamental fairness of exercising jurisdiction in particular situations. *See Ticketmaster*, 26 F.3d at 210. They "are not ends in themselves, but they are, collectively, a means of assisting courts in achieving substantial justice. In very close cases, they may tip the constitutional balance." *Id.* at 209. When applied to the case *sub judice*, the gestalt factors point unerringly toward the exercise, and away from the declination, of jurisdiction over BPC.

As to the first factor, we may fairly assume that the defendant's appearance in Puerto Rico is to some extent burdensome. But the concept of burden is inherently relative, and, insofar as staging a defense in a foreign jurisdiction is almost always inconvenient and/or costly, we think this factor is only meaningful where a party can demonstrate some kind of special or unusual burden. *See, e.g., id.* at 210 (noting that "most of the cases that have been dismissed on grounds of unreasonableness [of the burden of appearing] are cases in which the defendant's center of gravity, be it place of residence or place of business, was located at an appreciable distance from the forum"); *see also Burger King*, 471 U.S. at 474 (explaining that "it usually will not be unfair to subject [a nonresident defendant] to the burdens of litigating in another forum for disputes relating to [in-forum economic] activity"). In the modern era, the need to travel between New York and Puerto Rico creates no especially ponderous burden for business travelers. Thus, BPC has not adequately demonstrated that an exercise of jurisdiction in the present circumstances is onerous in a special, unusual, or other constitutionally significant way.

The second factor—the interest of Puerto Rico in having a Puerto Rico-based court adjudicate the dispute—weighs heavily in favor of an exercise of jurisdiction. Sovereigns have few interests greater than those in the conduct of forum-based litigation and the disposition of forum-based real estate. Here, these interests are not only present; they constitute the essence of the suit which the nonresident defendant, BPC, seeks to avoid.[9]

The third factor is the plaintiff's interest in obtaining convenient and effective relief. This consideration likewise cuts in favor of jurisdiction. Not only must we "accord plaintiff's choice of forum a degree of deference in respect to the issue of its own convenience," *Ticketmaster*, 26 F.3d at 211, but

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[9] At the expense of carting coal to Newcastle, we think that the Commonwealth also possesses an atypically strong interest in having Puerto Rico-based courts hear and resolve controversies involving its litigated credit statute.

also we must take note of the enormous inconvenience that might result from forcing Pritzker to sue elsewhere—theoretically, in every jurisdiction in which a financier is located—despite ongoing litigation in a forum-based court.

The fourth factor—the judicial system's interest in obtaining the most efficacious resolution of the controversy—similarly counsels against furcation of the dispute among several different jurisdictions. Such a result would both contravene the goal of judicial economy and conjure up the chimera of inconsistent outcomes.

The fifth and last of the gestalt factors implicates the interests of the affected governments in substantive social policies. Here, the most salient such policy is that embodied in article 1425 itself: the discouragement of speculation in litigation. All sovereigns share both a general interest in preventing such speculation and a specific interest in respecting Puerto Rico's decision to control this activity through speculation. For obvious reasons, a failure to find jurisdiction in this case would necessarily subvert these interests.

D. *Recapitulation.*

In sum, by deliberately contracting for a portion of the proceeds of litigation, the subject of which concerned Puerto Rico property and the situs of which was a Puerto Rico-based court, BPC deliberately sought to procure the commercial advantages of transacting business in Puerto Rico. Having called the tune, it now must pay the piper. Hence, we conclude that the instant litigation arises out of, and thus directly relates to, the financing agreement that BPC consummated with Dopp. Because that agreement has a distinctive relationship to Puerto Rico—as we have said, its subject matter and specific nature betoken that BPC purposefully availed itself of the benefits and protections of Puerto Rico and its legal apparatus—and because BPC's subsequent (involuntary) presence before the district court was entirely foreseeable, bringing BPC before the bar of a Puerto Rico-based court in respect to litigation arising out of the financing agreement is

neither unreasonable nor fundamentally unfair. It follows, therefore, as night follows day, that Puerto Rico's long-arm statute reaches this dispute, and the lower court's exercise of *in personam* jurisdiction over BPC is both legally and constitutionally supportable.

III. THE FINANCING AGREEMENTS

We turn now to the main event—a series of questions involving the enforceability and interpretation of the financing agreements. In answering these questions, we look to the law of Puerto Rico for the rule of decision.[10] *See Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938).

Article 1425 of the Civil Code confers on a defendant a right to redeem a "litigated credit," or "litigious credit," that is, the interest of a third party who has purchased a stake in the outcome of civil litigation. Evaluating this statute is a daunting task, made all the more complicated in this case as the parties have raised a myriad of issues ranging from the legal status of the financing agreements to the propriety of Pritzker's efforts to prime the article 1425 pump. We address these issues sequentially, for the most part subjecting the district court's determinations to plenary review. *See United States* v. *Gifford*, 11 F.3d 462, 472 (1st Cir. 1994) (holding that questions of statutory interpretation are purely legal in

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[10] BPC and Yari halfheartedly attempt to challenge the district court's choice of Puerto Rico law to govern their respective contracts with Dopp. Neither entry makes it to the starting gate. Yari merely proposes how his contract with Dopp might be construed under California law, without pausing to explain why California law is relevant. Our corpus of cases, cumulatively considered, clearly commands that contentions which are not carefully composed and candidly constructed customarily careen beyond the cognizance of this court. *See, e.g., Ryan v. Royal Ins. Co.*, 916 F.2d 731, 734 (1st Cir. 1990) ("It is settled in this circuit that issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned."). BPC's claim fails for several reasons, the first of which is that the record contains no indication that BPC developed it below. "It is a bedrock rule that when a party has not presented an argument to the district court, he may not unveil it in the court of appeals." *United States* v. *Slade*, 980 F.2d 27, 30 (1st Cir. 1992).

nature, and, thus, engender *de novo* review); *Liberty Mut. Ins. Co.* v. *Commercial Union Ins. Co.*, 978 F.2d 750, 757 (1st Cir. 1992) (same); *see also Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 239-40 (1991) (holding that "courts of appeals [must] review the state law determination of district courts *de novo*").

A. *Article 1425.*

We begin our expedition by clarifying certain matters relating to article 1425 (the text of which is reproduced in its entirety in note 3, *supra*). The undue hullabaloo in this case stems from the fact that article 1425 is a very unusual animal. Several aspects of the statute deserve emphasis or elaboration.

First, the purpose of article 1425, as recently restated by the Puerto Rico Supreme Court, is to prevent " 'the illegal trade of litigious credits which were purchased for a price below their actual value, and then the actual price was recovered from the debtor and big profits reaped.' " *Consejo de Titulares* v. *Urban Renewal & Hous. Corp.*, 93 J.T.S. 25 (1993) (Official English Translation: No. RE-87-291, slip op. at 14) quoting 3 D. Espin Canovas, *Manual de Derecho Civil Espanol* 240 (1983)); Mervin H. Riseman, *The Sale of a Litigious Right*, 13 Tul. L. Rev. 448, 448 (1939) ("A desire to put an end to litigation and to prevent speculation in lawsuits has resulted in the disapproval by the civil law of the sale of litigious rights."). To this extent, then, the district court hit the bull's-eye when it declared that the "single, serious purpose" of article 1425 is "to discourage financial speculation in litigation." *Pritzker* v. *Yari*, *supra*, at *5, slip op. at 11-12.

Second, the Puerto Rico Supreme Court has recognized, in fidelity to the statutory text, that "[a] credit is deemed litigious from the moment the lawsuit claiming the same is answered." *Consejo de Titulares*, *supra*, slip op. at 13. The court added:

> [A] credit is regarded as litigious when, upon being litigated, a final judgment is required to ascertain its existence, "that is, it is one which is in doubt and one in which the rights are uncertain. For a credit to be con-

> sidered litigious it is essential that the litigation pending at the time of sale or assignment of credit concern the existence of the credit itself and not merely the consequences of its existence once final judgment is rendered."

Id. at. 13-14 (quoting *Martinez* v. *District Court*, 72 P.R.R. 197, 199 (1951)). Here, there is no doubt that the financing agreements involve interests that fall within the contemplated chronological span.

Third, article 1425 identifies the parties in interest in terms that are somewhat different than those used in conventional litigation. We consider the "debtor" to be the original defendant (Pritzker), and the "assignee" to be the third-party investor (Yari, Lincoln, or BPC, depending on the financing agreement in question). To carry out this theme, the original plaintiff (here, Dopp) would be the "assignor."

Having thus introduced the generalities and particularities of article 1425, we proceed to consider its application.

B. *The Legal Status of the Financing Agreements.*

The financiers contend that none of their agreements with Dopp involved litigated credits subject to the strictures of article 1425. We reject this contention and hold that the financing agreements fall squarely within the purview of article 1425. Accordingly, the statute governs their legal disposition.

1. *The Transfer-of-Title Theory.* The financiers' principal argument is that article 1425 should not be applied to the financing agreements because the statute contemplates that an assignee will actually replace, not merely bankroll, the assignor in the prosecution of the latter's claim against the debtor, and that no such substitution transpired here. This amounts to a claim that article 1425 is only effective when the assignee steps into the shoes of the assignor, or, put another way, when

there has been the functional equivalent of a transfer of title to all or part of the assignor's lawsuit.[11]

In advancing this argument, the financiers rely heavily on the historical origins of article 1425 as found chiefly in the law of Spain and France. Citing numerous treatises and tracts, they strive to persuade us that the statute, when viewed in terms of its apparent original purpose, simply does not encompass the conduct at issue here. In particular, they suggest that laws like article 1425 were designed to prevent professional litigators from stepping into a plaintiff's shoes for the specific purpose of harassing a defendant. Because that is not what happened here, the financiers claim the statute is inapposite.

This is all well and good, but the text of article 1425 belies the financers' claim. The statute is drafted in term of general applicability and its language is bereft of the slightest ambiguity. No mention is made of a transfer-of-title requirement, and, moreover, the plain language of article 1425 seems naturally suited to the scenario presented in this case.

In brief, we have no reason to doubt the applicability of article 1425 to the financing agreements, and thus to Pritzker's efforts to redeem the interests they created, unless we are prepared to wander beyond the four corners of the statute in search of some ancient legislative intent. We cannot justify undertaking such extra textual measures in this case, especially given the interpretive command of the Puerto Rico legislature: "When a law is so clear and free from all ambiguity, the letter of the same shall not be disregarded, under the pretext of fulfilling the spirit thereof." P.R. Laws Ann. tit. 31, § 14 (1967 & Supp. 1989). Therefore, we reject the financiers' argument that article 1425 should be read to

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[11] Although we assume *arguendo* that all three agreements created interests exclusively in the proceeds, did not the conduct, of the D/P Litigation, we note that at least one of the financing agreements—Yari's—could be construed as empowering the assignee to exercise substantial control over Dopp's lawsuit.

impose a transfer-of-title requirement.[12] *Compare* Riseman, *supra*, at 460 (construing Louisiana's litigated credit statute, which, like the Spanish and Puerto Rico statutes, had its immeidate origin in the French Civil Code and its ultimate origin in the Roman *Lex Anastasiana* or *Lex Per diversas et Ab Anastasio*, and explaining that it "merely provides for the nullity of the purchase of litigious rights, and the litigious right itself is not annihilated. Thus title to the litigious right remains in the original owner, and he still has the right to proceed against his debtor for the amount owed to him.").

In following this course, we are not suggesting that historical analyses or foreign legal sources are intrinsically irrelevant in parsing the laws of Puerto Rico. We recognize that the Spanish Civil Code, in particular, may sometimes constitute significant authority in the interpretation of the Puerto Rico Civil Code. *See Republic Sec. Corp.* v. *Puerto Rico Aqued. & Sewer Auth.*, 674 F.2d 952, 958 (1st Cir. 1982); *see also Bonillerse* v. *Gonzalez*, 17 P.R.R. 1084, 1090 (1911) (explaining that Puerto Rico courts sometimes can look to eminent Spanish authors for the proper interpretation of such portions of our Civil Code as are copied literally from the Civil Code of Spain"). But recourse to these extrinsic sources

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[12] Yari tries to justify a transfer-of-title construction by asserting that the district court's application of article 1425 to his agreement with Dopp renders meaningless the statute's third sentence, which authorizes the debtor to extinguish a litigated credit "within nine (9) days, counted from the day *the assignee should demand payment of him.*" P.R Laws Ann. tit. 31, § 3950 (1991) (emphasis supplied). In Yari's view, this language requires that there have been a transfer of title from the assignor to the assignee, including a transfer of the right to proceed against the debtor. We decline to read the statute in so crabbed a manner. While this language unquestionably provides debtors in transfer-of-title situations with a temporal guidepost for effectuating a redemption (at least in certain situations, *see infra* Part III(C)), it does not thereby restrict the statute's overall scope. At best, the phrase to which Yari clings is designed to address a particular subset of litigated credits, not the mine-run.

is neither necessary nor appropriate when, as now, the text of a particular Code provision is unambiguous.[13]

2. *The "Legitimate Purpose" Theory.* Yari proposes that article 1425 is inapplicable to these financing agreements since the right of redemption does not attach when the assignment is made for a legitimate purpose, and that obtaining financing to carry on pending litigation, as Dopp purportedly set out to do, is such a purpose.

This argument founders for the most abecedarian of reasons: the statute itself contains no such exception, and the statutory text is not sufficiently problematic to invite judicial editing that might lead to the possible recognition of such an exception. As a fundamental principle of statutory construction, we will not depart from, or otherwise embellish, the language of a statute absent either undeniable textual ambiguity, *see United States* v. *Charles George Trucking Co.*, 823 F.2d 685, 688 (1st Cir. 1987) (expounding the primacy of plain meaning), or some other extraordinary consideration, such as the prospect of yielding a patently absurd result, *see Sullivan* v. *CIA*, 992 F.2d 1249, 1252 (1st Cir. 1993) ("Court's will only look behind statutory language in the rare case where a literal reading must be shunned because it would produce an absurd outcome, or when the legislature has blown an uncer-

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[13] Our unwillingness to rely upon extra-textual sources in this instance is reinforced by our reservations about the historical-exegetical enterprise advocated by the financiers. From a practical standpoint, we question the wisdom and utility of invoking ancient doctrines, gleaned from the writings of long-deceased expositors, as a means of interpreting statutes to govern the present day and age. Nor is this concern original with us. *See, e.g.*, *Diaz Irizarry* v. *Ennia, N.V.*, 678 F. Supp. 957, 962 n.5 (D.P.R. 1988). ("Romantic as working with the Civil Code may be, the clock cannot be turned back. It must be kept in mind that the application of Spanish law to problems arising from basic socioeconomic structures . . . which operate under standards stemming from federal or American law is consistent with neither practical reality and efficiency nor the sources of law actually being applied in Puerto Rico today."); *see also* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

tain trumpet.") (citations omitted); *see also Colonos de Santa Juana* v. *Sugar Bd.*, 77 P.R.R. 371, 374 (1954) (stressing the need, "wherever possible, [to] avoid an interpretation of a statute which would lead to an unreasonable result."), *aff'd*, 235 F.2d 347 (1st Cir.), *cert. denied*, 352 U.S. 928 (1956).

When interpreting a Puerto Rico statute, we must be faithful not only to conventional rules of construction, but also to the legislature's specific directives. One such directive is the edict that unambiguous statutes must be construed according to their letter. *See* P.R. Laws Ann. tit. 31, § 14; *see also Roman* v. *Superintendent of Police*, 98 P.R.R. 667, 671 (1966) (adverting to § 14 and admonishing that, when a statute is clear and explicit, courts have no authority to add limitations or restrictions that do not appear on its face).

This command carries unusual import in this situation, since the legislature has expressly carved out three distinct exceptions to the textual scope of article 1425. *See* P.R. Laws Ann. tit. 31, § 3951 (1991) (excluding "assignments or sales made: (1) To a coheir or coowner of the right assigned[;] (2) To a creditor in payment ot his credit[; or] (3) To the possessor of an estate, subject to the right in litigation which has been assigned"). The financiers' proposed exception is not to be found in this compendium. As the maxim teaches, "*expressio unius est exclusio alterius*." So it is here. Consequently, Yari's "legitimate purpose" argument must fail, as it asks us to engraft an exception beyond those enumerated, and does so in the face of unambiguous statutory text.[14]

3. *The "Fixed Price" Theory*. Next, Yari maintains that article 1425 applies only to contracts involving a fixed purchase price, and that his agreement with Dopp does not qualify in view of its somewhat novel line-of-credit feature. Because article 1425 itself has nothing to say about whether or when a price is fixed, we think this argument collapses by

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[14] We do not intend to imply that the legitimacy of Dopp's purpose in forging these financing agreements is altogether evident from the record. Rather, our disposition of Yari's argument renders further exploration of this point unnecessary.

virtue of the same legal principle previously discussed: a fixed price requirement does not appear on the face of the statute and can have no bearing on the interpretation of it.

In a transparent attempt to elude the force of plain meaning, Yari hawks an alternative construction of article 1425. He asserts that because the statute speaks in the past tense, it only relates to assignments that constitute, or have constituted, fully closed transactions. We think that this is anfractuous reasoning, yielding an undesirable, overly cramped construction of the statute. What is more, to the extent that this construction can be regarded as importing uncertainty into article 1425, the proper interpretive course would not be to retreat into formalism, as Yari suggests, but, rather, to distill and advance the "reason and spirit" of the statute. *See* P.R. Laws Ann. tit. 31, § 19 (1967 & Supp. 1989) ("The most effectual and universal manner of discovering the true meaning of a law, *when its expressions are dubious*, is by considering the reason and spirit thereof; or the cause or motives which induced its enactment.") (emphasis supplied).

Here, the policy behind the statute—to discourage litigious profiteering—would be disserved by allowing an assignee to avoid redemption merely by using something other than a fixed price as the consideration for his purchase. Thus, even if there is ambiguity within the text of article 1425—a proposition to which we do not subscribe—Yari's proposed construction is so isthmian as to offend the reason and spirit of the statute.

Because the text of article 1425 plainly covers the financing agreements, the district court correctly ruled that the statute governed their disposition.

C. *The Timing of the Tender.*

The next snare set by the financiers is contrived from a number of alleged improprieties which, they claim, render Pritzker's efforts to extinguish the credits invalid. Most of these assertions rest on the financiers' particular construction of article 1425, and, therefore, have no continuing legal rel-

evance in light of our understanding of that statute. *See supra* Part III(A)-(B). Withal, the financiers raise a colorable question as to the positioning and shape of the nine-day window, established in the third sentence of article 1425. We address this question.

The district court determined that the period in which Pritzker's article 1425 rights became operative "commenced on the date Pritzker knew officially that the assignments had been made." *Pritzker* v. *Yari*, *supra*, at *7, slip op. at 17. Since Pritzker acquired the requisite knowledge on October 9, 1992, and notified the parties of his intentions exactly one week later, "Pritzker theretore duly exercised his rights within the time provided by the statute." *Id.*

The district court's finding that Pritzker first learned of the litigated credits on October 9 is not open to attack.[15] This finding does not fully answer the question raised, because the financiers maintain that, even so, the statute obligated Pritzker not simply to *offer* to tender the funds necessary for redemption within the nine-day period, but also actually to tender those funds or, at the very least, deposit them with the court. Judge Pieras rejected this analysis, ruling that the law required Pritzker, during the nine day interval, merely to offer to tender the amounts necessary to acquire the interests then held by the assignees. *See id.* We think that the rejection of the financiers' temporal challenge is supportable, but we anchor it in a somewhat different, less confining rationale.

The parties and the district court saw the question as a matter of what actions had to be taken within the nine-day period. The financiers claimed that a debtor must actually tender the funds, or deposit them in the registry of the court, whereas the court, adopting a thesis urged by Pritzker, concluded that a debtor need only offer a tender or deposit of the funds. Both of these positions assume that the nine-day period is applicable to the litigated credits at issue here. We question this

[15] If anything, this finding may not give sufficient range to Pritzker's rights; while Dopp *disclosed* the existence of the financing agreements on October 9, Pritzker probably did not receive actual notice until October 12 or thereabouts.

threshold assumption. On reflection, a third construction of this portion of article 1425 presents itself; the nine-day period enumerated in the third sentence speaks only of situations in which, to use the statute's words, "the assignee should demand payment of [the debtor]." Under this third construction, the sentence in question does not govern the general operation of article 1425, but, rather, only governs its operation within one particular situation.[16]

We think that this construction is completely plausible in light of the unqualified declaration in article 1425's first sentence to the effect that "[w]hen a litigated credit is sold, the debtor shall have the right to extinguish the same . . . ." Moreover, if this interpretation prevails, it has obvious consequences for these appeals: although it is true that, where the nine-day period applies, it applies strictly, *see Conseio de Titulares*, 93 J.T.S. 25 (slip op. at 14) ("The legal term for the assigned debtor to exercise this litigious redemption is nine (9) days from the date the assignee claims payment. This term which is extinguished with the lapse of time is final, unextendable and cannot be tolled"), such rigidity is immaterial if the third sentence does not encompass the litigated credit in question.[17]

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[16] This is not such a situation. *See supra* note 12.

[17] Of course, even if this third construction is accepted, it does not answer the attendant question of whether the debtor's redemption efforts, once he has notice of a litigated credit, can ever be tardy. Both the spirit of the statute and common sense dictate that some temporal limit should obtain, and that a debtor's rights may, if not seasonably exercised, become stale and expire. *See Pritzker* v. *Yari*, *supra*, at *7, slip op. at 15-16 (hypothesizing that the purpose behind the nine-day window "is to prevent the unfair situation of a debtor litigating at length with an assignee and then, when the assignee has prevailed, exercising the right of redemption"); Riseman, *supra*, at 453 (discussing Louisiana's analogous statute and concluding that "[i]f, on learning of the transfer, [the debtor] continues to contest the suit, he may not, when he realizes that the judgment is about to become final or that he is going to lose the suit, avail himself of the provisions which the law has established in his favor for the purpose of terminating litigation"). Be that as it may, these appeals do not warrant a full-dress inquiry into timeliness, for Pritzker's offers plainly satisfy any timeliness rule that might apply.

We are left, then, with three competing interpretations of this portion of article 1425. Yet, the task of choosing among them is less formidable than it may first appear; for purposes of this case, it suffices merely to narrow the field. Once that is done, it becomes plain that, whether or not the third sentence applies in this instance, the assigned error lacks force.

If and to the extent that the third sentence of article 1425 has pertinence here, we agree with the lower court that it requires only an offer of redemption, not a full tender of funds, within the nine-day period. Any other interpretation would significantly undermine the efficacy of the statute, since it would force debtors to marshall the funds immediately on receipt of notice, or else forfeit their rights. Because assignees could more often than not time disclosure of their acquired interests to minimize redemption opportunities, the notice provision would become a trick box. We do not believe that the Puerto Rico legislature intended to place assignees in so advantageous a position.

In our estimation, the district court's shaping of the nine-day window produces a more realistic and balanced interpretation. Faithful to the overarching statutory purpose, this reading allows the debtor merely to offer to redeem the litigated credits within the nine-day period, thus placing the assignees on notice of probable redemption, but without backing the debtor into a cash-flow corner. This is the interpretation of the third sentence of article 1425 that we believe the Puerto Rico legislature intended and that we believe the Puerto Rico courts will adopt.

In an effort to salvage their competing construction through extra textual assistance, the financiers dredge up an assortment of other provisions of the Puerto Rico Civil Code containing time restrictions, which, they suggest, ought to inform our interpretation of article 1425. Although such extra-textualism is not improper here—the statute is, after all, opaque on this particular point—the financiers efforts are unavailing. For one thing, we remain unconvinced that randomly culled provisions, entirely unrelated to litigated cred-

its, have anything worthwhile to say about the construction of article 1425. *Cf.* P.R. Laws Ann. tit. 31, § 18 (1967 & Supp. 1989) ("Laws which refer to the same matter, or whose object is the same, shall be interpreted with reference to each other, in order that what is clear in one may be employed for the purpose of explaining what is doubtful in another"). For another thing, to the extent that other, unrelated provision are relevant, they seem to militate against, not in favor of, the financiers' interpretive stance. In this regard, the district court specifically noted that the legislature's use of more restrictive phrasing in article 1414, P.R. Laws Ann. tit. 31, § 3924 (1991) (stipulating that "[t]he right of legal redemption cannot be exeroised except within nine (9) days"), indicates that article 1425's nine-day window should be construed in a relatively liberal manner. "Had the legislature desired to place a similar restriction on the commencement of the right to redeem litigious credits, it would have used the limiting language of Article 1414, rather than the more flexible wording of Article 1425." *Pritzker* v. Yari, supra, at *7, slip op. at 16. In the end, all roads lead to Rome: the financiers' interpretation stalls no matter which interpretive path one decides to follow.

Having rejected the first of the three alternative constructions in favor of the second, we need not continue to pursue the selection process. If, on the one hand, the nine-day window applies—that is, if the second construction prevails—nothing beyond an offer to redeem is exigible at that point, and Pritzker's offer, made on day seven, undeniably meets the statutory standard. If, on the other hand, the nine-day window does not serve as a generic limitation on a debtor's ability to proceed under the statute—that is, if the third construction prevails—it follows *a fortiori* that Pritzker's failure to tender the necessary funds within nine days of receiving official notice is irrelevant, especially given his subsequent deposit of funds with the court.

For the foregoing reasons, we hold that Pritzker's efforts to redeem the financiers' interests fall within the temporal compass of article 1425.

D. *The Redemption of the Litigated Credits.*

Hesiod, reputed to be a shepherd and part-time poet, wrote in *Words of Days*, roughly 2700 years ago, that "right timing is in all things the most important factor." But timing is not the only salient factor under article 1425: the statute mandates that the debtor "reimburses the assignee for the price the [assignee] paid for [the litigated credit], the judicial costs incurred by him, and the interest on the price from the day on which the same was paid." Thus, article 1425 requires not only the correct chronology, but also the proper price.

In most situations, ascertaining the proper price poses no particular problem. For instance, BPC's and Lincoln's litigated credits each involved a discrete sum that had already been transferred to Dopp at the time Pritzker first exercised his statutory rights. The add-ons—"judicial costs" and "interest"—are subject to easy, mathematically precise computation. Neither BPC nor Lincoln disputes that, ultimately, Pritzker consigned the statutorily required amounts to the district court in respect to their assignments. Consequently, the sufficiency of Pritzker's payment to acquire the interests of these two financiers is not before us.

Yari's agreement is a horse of a slightly different hue.[18] It never involved a simple one-time transfer of funds. Instead, it originally involved two things—a sum of money, and assistance in establishing a line of credit—in exchange for a portion of the litigation proceeds. Later on, when Yari and Dopp amended their agreement, *see supra* note 2, the modification confirmed "that the parties 'fully intend to move forward with the present [July 23] Agreement despite the fact that a line of credit may not be obtainable.' " *Dopp III*, 831 F. Supp. at 954 (quoting amendment). It also suggested that, perhaps, Yari might become more personally involved in funding the D/P litigation. *See id.* (describing the modification as "call[ing] for Yari to advance to Dopp, in an amount to be determined

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[18] Even so, Yari does not raise any cognizable questions concerning the computation of "judicial costs" and "interest."

and to be negotiated by the parties in good faith, funds necessary to allow Dopp's prosecution of the [D/P litigation] to proceed diligently"). Yari thereafter complied with all specific funding requests made by Dopp.[19] All in all, Yari invested a total of $500,000, according to the district court, *see Dopp III*, 831 F. Supp. at 954, consisting of the following advances: $250,000 under the original financing agreement; $50,000 contemporaneous with the execution of the modification to the financing agreement; $100,000 on November 5, 1992; $50,000 in early December of the same year; and, finally, $50,000 in March of 1993.

We need not delve too deeply into details at this time; no matter what the fine print, it is perfectly clear that Yari's obligations under his agreement with Dopp involved both cash and non-cash components. Consequently, gauging the utility of Pritzker's redemption efforts prompts us to examine the meaning and scope of article 1425's reference to "the price . . . paid" for a litigated credit.

In certain respects, this is a choice between the devil and the deep blue sea. If the statute is interpreted to include only the cash component of a hybrid offer, then it may run afoul of the economic reality of the agreement. If, however, the statute extends to the non-cash component, then the twin risks of quantitative uncertainty and undesirable consequences loom, if for no other reason than that such a rule might induce contracting parties to structure financing agreements partly in kind so as to make redemption more arduous.

The district court opted for the former interpretation, specifically holding that "Pritzker does not assume Yari's obligations and is required to do no more to redeem the credit

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[19] Dopp waived the contention, belatedly raised in his reply brief, that the question of Yari's compliance *vel non* should have been submitted to the jury. *See Sandstrom* v. *Chemlawn Corp.*, 904 F.2d 83, 86 (1st Cir. 1990). More generally, we have no reason to disturb the district court's finding that, despite having failed to establish a line of credit, "Yari complied with his obligations under the agreements and would be entitled to those proceeds promised him under the terms of the Agreement and qualified thereafter." *Dopp III*, 831 F. Supp. at 956.

than to reimburse the price actually paid, plus interest and expenses." *Dopp III*, 831 F. Supp. at 956. To bulwark its position, the court noted that "[t]he courts of Louisiana, in applying the provision of the Louisiana Civil Code which is analogous to Article 1425, have reached the same result." *Id.* at 956 n.23 (citing Louisiana cases).

Though we do not go the whole hog, we agree up to a point. We hold, as did the district court, that compliance with article 1425 did not entail Pritzker's assumption of Yari's responsibility to fund Dopp's suit against him. In respect to damages arising out of a breach of contract, it is a basic tenet of contract law that a legal remedy (*e.g.*, a sum of money) is presumptively preferable to an equitable remedy (*e.g.*, specific performance), so long as the former is adequate and ascertainable. *See* 3 *Farnsworth on Contracts*, *supra*, § 12.4. Moreover, we echo the district court's sage observation that granting specific performance would be "flatly inconsistent with the purposes of Article 1425." *Dopp III*, 831 F. Supp. at 955 n.21. Endorsing such a remedy would force a debtor either to forgo redemption indefinitely (thus running the risk of losing his rights under article 1425) or to fund the assignor's case against him.

Thus, when an article 1425 assignee, in exchange for a stake in the outcome of litigation, transfers to the assignor both cash and non-cash consideration, the debtor must tender to the assignee the cash equivalent.[20] *Cf.* Riseman, *supra*, at 452 (suggesting that if the price actually paid is lower than the price stipulated in the financing agreement, "the 'redeemer' need pay only the 'real' price").

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[20] At the very least, the cash equivalent must correspond to the cash component of a hybrid offer. We take no view of whether there may be circumstances in which a debtor would have to augment the cash component by adding to it the cash equivalent of a non-cash component that has a demonstrable cash value. In this case, Yari introduced no evidence to show the value of the non-cash component; and, moreover, he never contended that Pritzker's tender must be augmented in this manner. Any possible argument in this regard is, therefore, waived. *See, e.g.*, *United States* v. *Slade*, 980 F.2d 27, 30 & n.3 (1st Cir. 1992).

It remains for us now to apply these principles to the case at hand. On this record, there is no evidence that Yari's promise to use best efforts to seek a line of credit sufficient to fund Dopp's efforts in the D/P Litigation has any demonstrable monetary value *See supra* note 20. Given this void, we agree with the court below that Pritzker should be permitted to redeem Yari's litigated credit despite having tendered only an amount corresponding to the funds actually transferred from Yari to Dopp prior to the time Pritzker sued to enforce his asserted right of redemption.[21]

E. *The Equitable Reduction of Yari's Litigated Credit.*

The district court, having determined that all three financing agreements came within the ambit of article 1425, ruled that the arrangement between Dopp and Yari required special treatment beeause their pact, as structured, concerned a "rare situation[ ]" involving "peculiar facts." *Dopp III*, 831 F Supp. at 958-59. The court identified two particular concerns. First, it expressed a sensitivity "to Dopp's need to obtain funds to maintain his action against Pritzker," *id.* at 957, bearing in mind that "Pritzker is a billionaire who could never be forced to relent in his defense, *id.* at 957 n.25. Second, the court reflected that, "although Yari technically complied with the terms of his agreement with Dopp, he did not succeed in providing what he originally intended. As a result, Dopp never received what he hoped he had bargained for under the agreement." *Id.* at 957.

Based on these two concerns, and mindful that Pritzker stood to receive a windfall on redemption of Yari's litigated credit, the court concluded *as a matter of statutory construction* that it "could not have been the intention" of the

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[21] Neither Pritzker nor Yari contests the trial court's use of the date Pritzker filed suit as the cutoff date for purposes of redemption. We, therefore, accept Judge Pieras' selection of that date uncritically, expressing no opinion on its propriety.

legislature to allow full redemption in such a situation."[22] *Id.* at 958. The court wrote:

> The Dopp/Yari agreement is far outside the heartland of agreements contemplated by the legislature when it enacted Article 1425. It is likely that the lawmakers did not envision the possibility of a case like this. Property and assets have traditionally been mortgageable to protect and preserve their value. In this case, the lawsuit's worth is an asset which requires expenditures for the services of attorneys and experts, as well as for other general costs of litigation to preserve its value. To apply Article 1425 without allowing for adjustments to reflect expenditures that have permitted the lawsuit to survive would be to deplete and maybe extinguish altogether the value of the lawsuit. . . .

Id. To ameliorate this perceived inequity, the court limited Pritzker's redemptive right to one-half the credit held by Yari. *See id.*

Pritzter contends that the lower court's ruling collides with the plain language and undeniable purpose of article 1425. This contention raises a question of statutory interpretation that sparks *de novo* review. *See Gifford*, 17 F.3d at 472; *Liberty Mut.*, 978 F.2d at 757.[23]

Exercising plenary review, we agree with Pritzker that, as a matter of law, the district court's ruling cannot stand. As with Yari's efforts to read certain unenumerated exceptions into the statute, *see supra* Part III(B), the district court's lim-

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[22] At certain points in his appellate briefs, Dopp intimates that the district court in effect reformed the Dopp/Yari financing agreement. We do not read the court's opinion in that way; and, moreover, the record on appeal evinces no basis for an order tantamount to an order of reformation.

[23] Of course, a district court's equity power is relatively broad and is typically subject to deferential review when the exercise of that power is genuinely a function of the court's discretion. *See* 1 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 4.16, at 4-125 to 4-126 (2d ed. 1986 & Supp. 1993). Nevertheless, such deference does

itation on Pritzker's redemptive rights finds no purchase in the text of article 1425. The very existence of the litigated credit statute envices the legislature's likely knowledge that windfalls can result when litigants barter future interests in litigation proceeds. It is thus telling that the statute's language neither suggests nor permits variable application depending upon the extent of a particular windfall, the size of a particular recovery, or the relative financial condition of particular litigants. This can only signify that, as between debtors and assignees, the legislature determined that the former, rather than the latter, more properly deserved the benefit of any trouvaille.

To be sure, it is always possible that legislators, in drafting a statute, may not have considered the entire gamut of possibilities that might come within the statute's sweep. Nevertheless, "[w]hen a law is clear and free from all ambiguity. the letter of the same shall not be disregarded, under the pretext of fulfilling the spirit thereof." P.R. Laws Ann. tit. 31, § 14 (1967 & Supp. 1989). In other words, courts, in Puerto Rico as elsewhere, are simply not free to disregard the unambiguous language of a law because the facts of a given case to which the law applies evoke a sympathetic reaction. *See, e.g.*, *Mansell* v. *Mansell*, 490 U.S. 581, 594 (1989) (declining "to misread [a] statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute"); *cf. East India Co.* v. *Paul*, 7 Moo. 85, 111 (P.C. 1849) (admonishing that "courts of justice [must] take care . . . that hard cases do not make bad law").

Nor can the court's decision be justified simply because the district judge rendered it under the rubric of equity and in "[t]he interests of justice." *Dopp III*, 831 F. Supp. at 958. While it is true that equity occupies an honored place in the

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not extend to whatever errors of law may underlie a district court's remedial or equitable determinations. *See id.* at 4-127 & n.4; *see also Narragansett Indian Tribe* v. *Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991) (exempting mistakes of law from equal deferential review accompanying district court's grant or denial of injunctive relief).

jurisprudence of Puerto Rico, judges may assume the role of chancellors only in the absence of a governing rule of positive law. *See* P.R. Laws Ann. tit. 31, § 7 (1967 & Supp. 1989) (ordaining that "[w]hen there is no statute applicable to the case at issue, the court shall decide in accordance with equity"). Here, there is an apposite statute, and, therefore, the district court's use of equitable principles to trump that statute is legally indefensible.

We need go no further.[24] Because the rights and obligations of Pritzker and Yari, *inter sese*, must be determined in accordance with the provisions of article 1425, unembellished by freeform concepts of equity, the halving of Pritzker's redemptive rights must be reversed.

IV. CONCLUSION

We succinctly summarize our conclusions. First, the district court appropriately exercised *in personam* jurisdiction over BPC. Second, the court correctly ruled that the three financing agreements involved litigated credits within the meaning of article 1425. Third, we hold that Pritzler's redemption efforts were both timeous and methodologically proper. Fourth, we hold that the district court lacked the authority to limit Pritzker's redemptive right to one-half of Yari's litigated credit.

The district court's judgment in respect to Pritzker's civil action is affirmed in part and reversed in part. The district court is directed to enter an amended judgment accordingly, when and as appropriate. Costs shall be taxed in favor of Pritzker.

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[24] Because Pritzker is entitled to redeem Yari's entire interest in the proceeds of the D/P Litigation (whatever that interest may be), there is no need to inquire into the district court's disposition of Yari's cross-claim against Dopp seeking a declaration, *inter alia*, that Yari is entitled to "[all] the rights created in his favor under the [financing] Agreement."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NOS. 88-1420 (JP), 92-2825 (JP)

PAUL S. DOPP

Plaintiff

—VS.—

JAY PRITZKER, *et al.*

Defendants

JAY PRITZKER

Plaintiff

—VS.—

BOB YARI, *et al.*

Defendants

OPINION & ORDER

The Court had before it several waves of briefs in these two related actions which address a host of issues—but this litigation is no stranger to difficult and protracted legal battles. In reviewing the appeals that arose out of its first jury trial, Judge Selya, writing for a panel of the First Circuit, characterized the task they faced as an "odyssey." *Dopp v. HTP Corp.*, 947 F.2d 506, 509 (1st Cir. 1991). Since that time, the

litigation has become even more complicated, primarily because of the filing of the second action, which addresses the propriety and effect of a series of sales of financial interests in the plaintiff's potential recovery. As a result, the Court now finds itself poised like Homer's mariner at the mouth of the straights guarded by Scylla and Charybdis, hoping to emerge with considerably less damage to its crew.[1]

I. Background

On May 9, 1984, Code Hospitality, a corporation wholly owned by Paul S. Dopp, entered into a Purchase Agreement to acquire all the stock or assets of a corporation called the Dorado Beach Hotel Corporation (hereinafter "DBHC"). When this Agreement was signed, DBHC owned approximately 1,000 acres of ocean front property on the north coast of Puerto Rico, in Dorado, including two resort hotels—the Dorado Beach and the Cerromar—and four golf courses. The Purchase Agreement provided Code with the option to acquire all the stock or assets of DBHC for $40.5 million by December 3, 1984. To secure performance under the Purchase Agreement, Dopp pledged a $2 million letter of credit.

In November 1984, after fruitless discussions with a host of financial institutions and prospective investors, Dopp approached Jay Pritzker, the chairman of Hyatt Corporation. By telephone, they entered into an Oral Contract pursuant to which Pritzker agreed to provide all the funds needed to exercise Code's obligations under the Purchase Agreement. In exchange, Pritzker was to receive an 80 percent interest in a corporation—later called HTP Corporation—that would be formed to acquire DBHC's stock. In addition, the Oral Con-

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[1] In *The Odyssey*, Homer personified Scylla as a female monster with six heads who, perched atop a rock on the eastern side of the straights, would devour everything that came within her reach, a half dozen at a time. He depicted Charybdis as a whirlpool off the western side of the straights which, if not properly regarded, would consume his entire ship. The goddess Circe instructed Odysseus: "Ah, shun the horrid gulf! by Scylla fly. 'Tis better six to lose, than all to die." *The Odyssey*, Book XII, lines 137-38.

tract provided that a Hyatt affiliate would be awarded a long-term contract to manage the hotels. Dopp and a partner, in turn, were to receive the remaining 20 percent of the shares of HTP and would be repaid all monies that they had expended in anticipation of the closing. Several days later, and on the eve of the date the option to purchase the Hotels was to expire, Dopp, Pritzker (represented by Richard Schulze) and Dopp's partner met to draft the necessary agreements to implement the Oral Contract. At this time, as determined by a jury, Pritzker breached the Oral Contract by conditioning his funding of the deal, and the execution of the same, upon the inclusion of a clause which granted him the option to buy out Dopp and his partner for $1 million dollars at any time during the next 10 years.[2] The jury found that these actions by Pritzker constituted serious deceit or duress.

Duress, which is known in the Civil Code as intimidation, exists when one of the contracting parties is inspired with a reasonable and well-grounded fear of suffering an imminent and serious injury to his property. 31 L.P.R.A. § 3406. Deceit, which is roughly translated as "dolo" in the Spanish language, may be found when by words or insidious machinations on the part of one of the contracting parties the other is induced to execute a contract which he would not otherwise have made. 31 L.P.R.A. § 3408. These doctrines have their counterparts in the common law. For example, under the common law

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[2] On December 3, 1984, the parties executed two separate contracts. Through the first, Code assigned to HTP its rights under the Purchase Agreement. In turn, Pritzker agreed to assume Dopp's obligations under the $2 million letter of credit and to pay him a consulting fee. Through the second, called the Stock Subscription Agreement ("SSA"), HTP's stock was to be distributed in the following way; 80 percent to Pritzker through an entity designated by him, 12 percent to Dopp, and 8 percent to Dopp's partner. The SSA contained the buyout clause granting Pritzker the option to buy out Dopp and his partner for $1 million dollars at any time within the next ten years. The Purchase Agreement was closed on December 4, 1984. HTP acquired DBHC's stock and Pritzker supplied the funds. Thus, HTP became the owner of DBHC, which in turn owned the Dorado and Cerromar properties. Thereafter, the $2 million letter of credit was cancelled and Dopp and his partner were reimbursed the $710,000 that they had advanced for expenses.

"deceit" is defined as "[a] fraudulent and cheating misrepresentation, artifice, or device used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon." *Black's Law Dictionary* (Rev'd 4th ed. 1968) at 493. The similarity in the causes of action is commensurate with their common roots in Roman law. Both require a showing of an act or omission which is something more than simple negligence but also something less than fraud. This cause of action lies right between a tort and a criminal fraud. In finding that Pritzker had committed deceit ("dolo") under the facts of this case, the jury in effect determined that Pritzker had abused his superior economic position to procure illegally Dopp's concessions regarding the buyout option; Pritzker also drove Dopp to a point of no return that left him no other alternative but to accept Pritzker's proposition in breach of this previous oral promise. In short, that he had breached accepted standards of business ethics codified into the law of the land.[3]

The court entered judgment based on the jury's verdict and a later determination that Dopp was entitled to an order annulling the buyout option. Ten appeals were filed. The First Circuit remanded the case, Civil Case No. 88-1420 (JP) (hereinafter "the Main Case"), with its liability verdict intact but stripped of its remedies.[4] The circuit court directed that a second jury trial be held to determine the amount of Dopp's damages under three alternative legal theories and that he then be afforded the opportunity to make an election from among these remedies. The second trial commenced on March 8,

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[3] The concept of business ethics is embedded in our Judeo-Christian philosophy. It has been the subject of laws and of literature. Rómulo Gallegos in his renowned novel, "Doña Bárbara," symbolizes it through the erection of fences in the Venezuelan prairie ("llanos venezolanos") to guide men's conduct. Business ethics have also been included in the curriculum of our institutions of higher learning. Rev. William J. Byron, S.J., forner president of the Catholic University of America, teaches a course at Georgetown University on the topic.

[4] For additional background regarding the liability-related issues in the Main Case, *see Dopp v. HTP Corp.*, 947 F.2d 506 (1st Cir. 1991), and *Dopp v. HTP Corp.*, 755 F. Supp. 491 (D. Puerto Rico 1991).

1993, with the jury rendering its verdict on March 27, 1993.[5] After the trial, Dopp elected as his remedy the resolution of the Oral Contract. The Court now has before it post-trial motions filed by both sides attacking various aspects of the jury's verdict. In addition, the Court has before it memoranda of law filed by both sides regarding Dopp's election of remedies.

Meanwhile, swirling below this rocky terrain is Civil Case No. 92-2825 (JP) ("the Litigated Credits Case"), in which Pritzker has sought to extinguish some or all of the recovery to be obtained by Dopp on grounds that Dopp sold stakes in his recovery in the Main Case which may be redeemed by Pritzker under Article 1425 of the Puerto Rico Civil Code. The Court entered partial summary judgment in the Litigated Credits Case on April 19, 1993, declaring that Article 1425 applies to the agreements through which Dopp sold stakes in his recovery. The Court now has before it several motions attacking the Court's entry of partial summary judgment. Also before the Court are issues addressed during a Non-Jury Trial held on June 10, 1993, to determine the rights of the various parties pursuant to Article 1425.

II. Pritzker's Motion to Consolidate

Before sailing through these choppy waters, the Court must first address briefly a Motion to Consolidate filed by Pritzker in the Main Case on April 16, 1993 (docker No. 545). For the reasons set forth below, the motion is hereby GRANTED.

Rule 42(a) of the Federal Rules of Civil Procedure provides a trial court with broad discretion to order actions consolidated where they involve a common question of law or fact. Although these two cases are very different, involving distinct questions of law and several different parties, most of the difficult issues presented by both cases have been resolved. All that remains is to determine the amount of the Dopp's recov-

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[5] The verdict, as recorded in the Court's Judgment dated March 29, 1993, was as follows: (i) full damages—$17 million; (ii) damages accessory to annulment—$0; and (iii) damages accessory to resolution—$19,621,000 for resolution *in natura*; $210,071,000 for resolution in kind.

ery in the Main Case and the extent of Pritzker's right to extinguish portions of that recovery through the Litigated Credits Case. These tasks are completed in this Opinion & Order. The two cases are intimately related. The Court finds that the interests of judicial economy weigh in favor of consolidation.

III. Pritzker's Motion for Relief From Judgment Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (Docket No. 537)

Pritzker seeks relief from the Judgment entered in the Main Case on March 29, 1993 (docket No. 514), on two grounds: first, that a mistake was made in the jury's verdict regarding the monetary equivalent of resolution which has the effect of providing a double recovery to Dopp; and second, that the Judgment as a whole cannot be deemed "final" because of issues which remain open in both the Main Case and the Litigated Credits Case. The motion is hereby GRANTED in part.

The first error alleged by Pritzker is rendered moot by the Court's holding, *see infra* at Part VI, that the plaintiff is not entitled to resolution as a matter of law. As to the second error alleged, the defendant is correct that for many reasons the Judgment entered by the Court on March 29 is a partial judgment which does not conclude the proceedings in this case. The Court therefore GRANTS the defendant's request for relief to clarify that the Judgment entered was not, and was never intended to be, final.

IV. Pritzker's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial (Docket No. 538)

In this motion, Pritzker offers no fewer than 14 errors which he believes were made during the second trial in the Main Case. Several of these alleged errors overlap, however, so that in truth he advances only seven grounds for a JNOV or New Trial. Moreover, four of these seven grounds relate to issues arising from the jury's verdict on resolution and are

rendered moot by the Court's determination, *see infra* at Part VI, that the plaintiff is not entitled to resolution as a matter of law.[6] The Court therefore addresses only the remaining three grounds.

A. Plaintiff introduced evidence of deceit and duress and other evidence which inflamed the jury so that it rendered a punitive award (No. 1), and refused to award the defendant necessary expenses to which he was legally entitled (No. 4).

During the trial, the Court, determined not to allow the parties to reargue their positions regarding the defendant's liability, restricted argumentation and evidence regarding the issue of deceit or duress. The parties could not be allowed to divert the jury's attention from the task of rendering a verdict on damages by introducing unnecessary evidence regarding the defendant's liability-related conduct. Nonetheless, the damages in this case necessarily arose from the defendant's liability-related conduct. The two issues are inextricable. It would have been impossible to ask the jury to return a verdict on damages without some understanding of the conduct which lead to the defendant's liability.

To provide the jury with the necessary context, the Court included in its opening instructions a summary of the liability-related facts established during the first trial. During the presentation of evidence, the Court allowed the parties the

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6 These four grounds are:

1. The jury's award of fruits was contrary to the law of Puerto Rico and the evidence presented at trial (Nos. 5 - 8).

2. The jury's verdict regarding the monetary equivalent of restitution is contrary to the weight of the evidence (No. 9).

3. The jury's verdict regarding the value of Dopp's contract to purchase DBHC was contrary to the weight of the evidence (No. 11) and resulted from a failure to give requested instructions (No. 12).

4. Evidence of the current net value of DBHC was irrelevant to Dopp's damages (No. 13) and the jury's verdict as to the present net value of DBHC was unsupported by the evidence (No. 14).

opportunity to address the jury regarding these undisputed liability-related facts. Any comments by the plaintiff or his attorney regarding deceit or duress, provided they were not otherwise argumentative or prejudicial, fell within the parameters established by the court. Where comments by the plaintiff or his attorney went beyond mere deceit or duress, they were allowed because of comments or tactics on the part of the defendant which opened the door for a response. In particular, the testimony of the plaintiff regarding his dealings with Mr. Héctor González was allowed because the defendant introduced testimony from Mr. González which endeavored to establish the plaintiff's alleged inability to close on his contract to purchase the Dorado Beach Hotel Corporation ("DBHC") absent the assistance of Mr. Pritzker. The defendant offered this testimony to suggest to the jury that the plaintiff was entitled to no damages because he would have gained nothing—would have, in fact, lost $2 million—without Mr. Pritzker's participation in the deal. The testimony tended to reopen the issue of the defendant's liability. It also insinuated that the value of Dopp's contract to purchase DBHC at the time the Oral Contract was entered into—a critical issue forming the basis of the measure of full damages—was zero. The plaintiff was compelled to rebut this testimony with other evidence showing Pritzker's view of the value of Dopp's contract and the Court was required to give the plaintiff wide latitude. Evidence regarding attempts by the defendant to procure the contract and the willingness of the defendant to jeopardize gambling contracts in New Jersey and Nevada to obtain the contract was therefore relevant and not unduly prejudicial. Defendant's motion is therefore DENIED as to this issue.[7]

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[7] The defendant also objects that counsel for the plaintiff suggested to the jury that they should enter a punitive award by stating in his closing argument that Dopp is entitled to recover large sums as fruits because "[t]hat's a penalty imposed by the law." The Court refects this contention for several reasons. First, the statement was made not in the context of the plaintiff's entitlement to fruits but in the context of the defendant's entitlement to reimbursement for necessary expenses. Second, the defendant did not object to the comment at the time and there-

B. The jury's verdict of full damages in the amount of $17 million was not supported by any evidence (No. 2) or, alternatively, was against the overwhelming weight of evidence (No. 3).

Under the full damages theory, Dopp is entitled to the difference between the value of what he was promised under the Oral Contract and the value of what he actually received under the Stock Subscription Agreement. In other words, he is entitled to the difference between the value of his 12 shares of HTP Corporation, which were unencumbered under the terms of the Oral Contract, and the value of the 12 encumbered shares he received under the terms of the Stock Subscription Agreement. The jury, being so instructed, returned a verdict under the full damages theory in the amount of $17 million. Pritzker attacks this verdict as unsupported by the evidence.

The well-established standard in the First Circuit for granting a motion for judgment *non obstentio verdicto* (JNOV), which is now known as a judgment as a matter of law, is "very rigorous." *MacQuarrie v. Howard Johnson Co.*, 877 F.2d 126, 128 (1st Cir. 1989). Such a motion may only be granted "when the evidence, and the inferences to be drawn therefrom, viewed in the light most favorable to the nonmovant . . . could lead reasonable persons to but one conclusion." *Dopico-Fernández v. Grand Union Supermarket*, 841 F.2d 11, 12 (1st Cir.), *cert. denied*, 488 U.S. 864 (1988). In effect, to grant a motion for judgment as a matter of law, the Court must find that the jury, upon hearing all the evidence properly admitted, acted unreasonably. Such a conclusion can only be reached under circumstances in which it is clearly dictated. A trial court must always be mindful that "[n]either [its] disagreement with the jury's verdict nor the fact that [it] would have found otherwise in a bench trial, is

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fore waived any objection. Third, a statement that a certain aspect of the law reflects a penalty does not form the basis of a claim for punitive damages. Fourth, in its context, and with the instructions given by the Court, the jury could not have felt they were to enter a punitive award.

a sufficient basis to displace a jury's verdict." *Davet v. Maccarone*, 973 F.2d 22, 29 (1st Cir. 1992).

Pritzker has, in essence, two objections to the jury's verdict on full damages. First, he argues that the jury improperly accepted Dopp's proposition that the value of his minority interest in HTP may be equated, in direct proportion to the number of minority shares, to an equal percentage of the value of HTP's assets net of their costs. This objection is easily rejected. In essence, Pritzker complains that the jury improperly assessed credibility and rejected the theories advanced by his experts. He seeks to have the court declare that a reasonable jury could not have accepted the theory advanced by Dopp's experts.

Respected experts could disagree on the proper way to appraise the value shares of stock in a closely held corporation. The task involves a multitude of considerations regarding, among other factors, the purposes of the appraisal, the applicable standard of value, the reliance on projected or historical data, the value of a minority versus a controlling interest, the marketability of a minority interest, the techniques for forecasting and discounting future returns, the ability of a minority interest holder to adequately gather relevant data, and the assembling of a list of comparative transactions. *See generally* Pratt, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* (Dow Jones-Irwin 2d ed. 1989). Experts could disagree on each of these issues, as well as many others. In this case, the experts did in fact disagree. Under such circumstances, the responsibility for determining which position is more credible or appropriately applied falls to the jury. The defendant's attempt to have the Court displace the credibility assessment made by the jury is at the core of matters not reviewable on a motion for judgment as a matter of law.[8]

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[8] There can be no doubt that the evidence presented in this case was complicated. The jury's task in rendering a verdict entailed a series of computations involving millions of dollars. However, of the nine jurors empaneled, four had received degrees in accounting or business administration. The jury was therefore highly qualified to render a verdict in this case. Its expertise is reflected in the fact that the verdict which it rendered was reasonable.

Second, Pritzker argues that the jury inappropriately determined full damages based on a calculus presented by Dopp's counsel in his closing argument which was allegedly infected by improper computations. This argument must also be rejected, for several reasons. First, it is not at all clear that the jury accepted the calculus presented by Dopp's counsel. As a general matter, in a case which lasted several weeks and which involved the presentation of exceedingly complicated factual and expert evidence, it is difficult, if not impossible, to gauge in any meaningful way the thought processes of the jury. Moreover, as a practical matter, the fact that the jury awarded Dopp almost $1 million less than he asked for indicates that they did not accept the calculus he presented.

More importantly, however, regardless of the steps which led the jury to its verdict on full damages, the verdict itself is reasonable based on the evidence. Pritzker argues that the jury's verdict must be invalid because "the *most* that Dopp's full damages could ever have been is measured by 12% of the net value of HTP on December 3, 1984." This is not so. In calculating the loss suffered by Dopp as a result of the inclusion of the buyout option in the Stock Subscription Agreement, the jury need not have limited its consideration to the actual value of Dopp's unencumbered shares in HTP as of the date of the breach of the Oral Contract. The jury was required to determine Dopp's *loss* as of the date of the breach; however, at that moment Dopp's loss included the likelihood that he would be deprived of any participation in the future profits generated by the properties. The jury could have taken into account that a corporation which owns world-class resort properties could potentially generate considerable future profits—profits which would be denied to Dopp if his shares were bought out by Pritzker. Without the buyout option in the Stock Subscription Agreement, Dopp controlled 12 unencumbered shares in HTP. Like any investment, Dopp's 12 shares had the potential to make money or to lose money. And they had this potential *ad infinitum*—that is, Dopp would continue to benefit, or to lose, as a result of his shares in HTP until he chose to withdraw from the investment or a situation otherwise dictated his withdrawal.

The jury's task in determining the amount of money which Dopp would have otherwise enjoyed as a return on his investment was not an easy one. The Court finds, however, that it was not unreasonable for the jury to conclude that the evidence supported a verdict of $17 million. The jury had at its disposal ample evidence regarding the profits to be generated from the hotels, from the real property, and from the management of the hotels to support its verdict.

C. Dopp failed to demonstrate that he could have exercised his option to purchase DBHC (No. 10).

This issue goes directly to the issue of defendant's liability and was established conclusively by the verdict rendered in the first trial. The plaintiff was not required, nor even allowed, to address this issue in this trial.

V. Dopp's Motion to Alter or Amend the Judgment as to the Full Damages Remedy (Docket No. 540)

In this motion, Dopp advances a theory he presented to the Court during the trial—that the measure of full damages should reflect the monetary equivalent of resolution. Among other things, the theory is predicated on the notion that Dopp is entitled to resolution, which he is not. *See infra* at Part VI. The motion is therefore DENIED.

VI. Plaintiff's Motion Electing Resolution as his Remedy (Docket No. 552); Brief in Support of Plaintiff's Election of Resolution as His Remedy (Docket No. 560); Memorandum of Defendant Jay Pritzker with Respect to Issues Relating to Resolution of the Oral Contract (Docket No. 559).

Pursuant to the circuit court remand, the plaintiff was required, after the jury rendered its damage verdicts under the theories of full damages, damages accessory to annulment, and damages accessory to resolution, to make an election among these remedies. The plaintiff elected resolution. Since the issue of the plaintiff legal entitlement to resolution has

remained open, the Court accepted from the parties memoranda of law discussing the issue.

The plaintiff's memoranda nonetheless begins with the insupportable proposition that "the Court of Appeals for the First Circuit has already determined that Pritzker breached a reciprocal obligation . . . [so that] Dopp is entitled to demand resolution, together with the accessory damages assessed by the jury." The Court simply points out that the circuit court opinion clearly states:

> Depending on the proof, the plaintiff *may or may not*, as an alternative to annulment, satisfy the district court that he is entitled to an order for resolution of the Oral Contract. *We, of course, intimate no view as to that question.*

Dopp. v. HTP, 947 F.2d at 520 (emphasis added). The plaintiff's suggestion that circuit court *has* intimated a view on this question—has, in fact, ruled in the plaintiff's favor—is flatly incorrect.

A. Resolution Generally

The law of resolution under the Puerto Rico Civil Code has been described in opinions issued in this case by both this Court, *see Dopp v. HTP*, 755 F. Supp. at 497-98, and by the First Circuit, *see Dopp v. HTP*, 947 F.2d at 510-11. Nevertheless, because this is a crucial issue facing the Court, a brief review of its contours is in order.

Article 1243 of the Civil Code establishes the right to rescind any contract "specially determined by law." 31 L.P.R.A. § 3492(5). Article 1077 provides:

> The right to rescind the obligations is considered as implied in mutual ones, in case of one of the obligated persons does not comply with what is incumbent upon him.
>
> The person prejudiced may choose between exacting the fulfillment of the obligation or its recision, with indemnity for damages and payment of interest in either case. He may also demand the rescission, even after hav-

> ing requested its fulfillment, should the latter appear impossible.
>
> The court shall order the rescission demanded, unless there are sufficient causes authorizing it to fix a period.
>
> This is understood without prejudice to the rights of third acquirers . . . .

31 L.P.R.A. § 3052. The effect of a resultory action is that the parties are obliged to return "the things which were the objects of the contract, with their fruits and the price with interest." 31 L.P.R.A. § 3514. Not every breach of a contractual obligation gives rise to a resultory action under article 1077. *See Del Toro v. Blasini*, 96 P.R.R. 662, 669 (1968); *Vélez v. Ríos*, 76 P.R.R. 806, 811-12 (1954); *Ponce v. Vidal*, 65 P.R.R. 346, 351 (1945). For such an action to exist "the nonfulfilled obligation must be of a reciprocal character." *Vidal*, 65 P.R.R. at 351. The Supreme Court of Puerto Rico has stated that reciprocity inheres when "there are obligations and correlative obligations [that are] so interdependent between themselves that one is the consequence of the other, and the performance of said obligation by a contracting party constitutes the motive of the contract for the other party and vice versa." *Id.* As this Court has previously explained:

> The Civil Code provides no definition of reciprocal obligation giving rise to a resolutory action, although the commentators and the courts have discussed the concept extensively. Vélez Torres has stated that when both of the contracting parties remain obligated by means of the origin of the legal relationship between them, it is said that there are reciprocal relations ("relaciones recíprocas") because the obligation of one is derived from the obligation of the other; in order to be considered a motive for resolution, the unfulfillment must be related to a principal, reciprocal obligation. IV J. Vélez Torres, *Curso de Derecho Civil*, 47, 52 (1981) (paraphrasing ours). Velázquez has noted that sinalagmatic (bilateral) contracts are those that create reciprocal obligations, and in such contracts, the reciprocal obligations of the par-

ties are served mutually as consideration or the motive or reason for entering into the contract, and if one of the parties does not perform its obligation, the other party is not compelled to perform its (reciprocal) obligation. G. Velázquez, *Las Obligaciones Seqún el Derecho Puertorriqueño* SS 21, 23 (1964). *See also* II A. Blanco, *Curso de Oblígaciones y Contratos* 332 (1980) (resolution is the consequence of the nonfulfillment of one of the contracting parties' reciprocal obligations).

In addition, the Supreme Court of Puerto Rico has stated that in bilateral contracts, there are "obligations and correlative obligations" which are "so inter-dependent" that one is a consequence of the other; the performance of the obligation by a contracting party constitutes the motive of the contract for the other party, and vice versa. *Vidal*, 65 P.R.R. at 351. *See also Del Toro v. Blasini*, 96 P.R.R. 622, 669 (1968) (if one of the promises constituting the mutual consideration is not executed, the correlative obligation ceases to have consideration). Likewise, the Supreme Court of Spain, in discussing reciprocal obligations and Article 1.124 of the Spanish Code (the equivalent of Article 1077), has said that before it can be stated that reciprocal or bilateral obligations are involved, it is necessary not only that obligations or consideration ('prestaciones") from both parties exist in the same contract, but also that the obligation of one party should be correlative to the obligation of the other, and consequently, there should exist between the two parties a mutual undertaking. This "undertaking" produces a twofold result: first, in order for Article 1.124 of the Civil Code to apply, the condition of reciprocity must be so well established that one obligation cannot be conceived without the other. Second, Article 1.124 may not be applied to obligations which, even though incorporated as part of a unilateral or bilateral contract, have an accessory or complementary character in relation to those promises and correlative promises which constitute the main object of the

> contract. Decision of January 5, 1935, Supreme Court of Spain, 217 *Jurisprudencia Civil* 46 (citations omitted) (paraphrase of Supreme Court translation in *Vidal*, 65 P.R.R. at 355).

Dopp v. HTP Corp., 755 F. Supp at 497-98 (footnotes omitted). Where the unfulfilled obligation lacks this interactive quality, the aggrieved party is entitled to recover full damages, but is not entitled to resolution. *See Del Toro*, 96 P.R.R. at 669. Where the contractual obligations are mutual and reciprocal, however, article 1077 attaches.

B. Resolution in Natura

Where mutual obligations have been breached and the return of the properties exchanged under the contract to be resolved is feasible, the plaintiff is entitled to the entry of an order of resolution *in natura*. The plaintiff has requested such an order. The Court finds, however, that special problems prevent an order directing that Dorado Beach and Cerromar hotels be transferred to Dopp.

Article 1077 of the Civil Code directs, in part, that upon resolution of a contract the parties be returned the things which were the objects of the contract. Dopp seeks to invoke Article 1077 to have the Dorado and Cerromar properties "returned" to him. The properties cannot be returned to him, however, because he did not transfer them to Pritzker under the terms of their agreement. He could not have done so because *he never owned the properties*. He owned only a contract to purchase the properties for $40.5 million. This is what he transferred to Pritzker. The closest Dopp ever came to owning the hotels was his 12 percent interest in HTP Corporation *after* the Oral Contract was made. If Dopp had owned the hotels and sold them to Pritzker for $40.5 million plus a 20 percent participation interest in their future ownership, then a straightforward application of Article 1077 would result in the return of the properties to Dopp if the contract transferring their ownership was resolved. However, Dopp's reciprocal obligation (*see infra* at 24) was to assign to

Pritzker his contract to purchase DBHC, not to sell the properties. Dopp cannot claim the property as the item given by him in discharge of his reciprocal obligations. He is not, under the terms of the Civil Code, entitled to have the properties returned to him.

An argument could be made that Pritzker's opportunity to purchase the hotels was a "fruit" derived from his unlawful control of Dopp's contract to purchase which he must return to Dopp. This theory stretches the operation of Article 1077 beyond any reasonable point, however. It would allow the "fruits" portion of the statute to overwhelm the rest. It would require the Court to enter into an imaginary world in which Dopp's right to purchase the hotels, which has not existed for eight years, is somehow revived. It would also allow Dopp to get *more* than he had prior to entering into the Oral Contract, and such unjust enrichment must be avoided. For these reasons, the Court FINDS that an order of resolution *in natura* would be impracticable and contrary to the terms of the Civil Code in this case.

C. Resolution in Kind

When resolution *in natura* is not feasible, Article 1247 of the Civil Code directs the entry of an order of resolution in kind. Article 1247 provides:

> Rescission obliges the return of the things which were the objects of the contract, with their fruits and the price with interest; therefore it can only be carried into effect when the person who may have claimed it can return that which, on his part, he is bound to do.
>
> Neither shall rescission take place when the things which are the object of the contract are legally in the possession of third persons who have not acted in bad faith.
>
> In such case the indemnity for damages may be claimed from the person who caused the lesion.

31 L.P.R.A. § 3496. The Court must therefore, given its finding that resolution *in natura* is not feasible, consider whether Pritzker must indemnify Dopp for the monetary equivalent of resolution *in natura*. The Court FINDS that the plaintiff is not entitled to resolution in kind because he has not shown that he is legally entitled to resolution in any form.

In its Opinion & Order entered after the first trial in this case the Court held:

> After careful consideration of plaintiff's argument, we conclude that *the inclusion of the option clause in the written contract does not constitute the unfulfillment of a reciprocal obligation of the oral agreement as contemplated by Article 1077 of the Civil Code*. In this case, the oral agreement between plaintiff and Pritzker provided that the Pritzker interests would furnish all the money for the deal and Mr. Dopp would be reimbursed for all the costs he had incurred, the Pritzker interests would receive an 80 percent interest in the stock of the corporation which would acquire the Dorado Beach Hotel Corporation stock and a long-term contract for managing the hotel. Dopp would receive a 20 percent interest in the stock of the corporation which would acquire the Dorado Beach Hotel Corporation stock. (Tr. 1354.) Thus, the reciprocal obligations or the consideration or motive for each of the parties to enter into the contract would be, for the plaintiff, the Pritzker interests furnishing the money for the deal and reimbursing plaintiff for the costs he had incurred, as plaintiff's receiving a 20 percent interest in the corporation acquiring Dorado Beach Hotel Corporation, and for the Pritzker interests, receiving a majority (80 percent) interest in the corporation acquiring Dorado Beach Hotel Corporation and the long-term contract for managing the hotel properties.
>
> The plaintiff claims that one of his reasons or motives for entering into the oral contract, one of the "conditions of reciprocity" which could not be conceived without defendant Pritzker's obligations, was an undiluted 20%

> equity participation in the corporation which would own the Dorado and Cerromar hotels. He makes this assertion even though he "fully expected that there would be some reasonable option." (Tr. 116.) According to the plaintiff, the imposition of the option clause, which was expected by plaintiff, diluted the value of his participation and therefore gave rise to the unfulfillment of defendant's "reciprocal obligation" to give the plaintiff 20% participation.
>
> We do not agree. As stated above, because the jury found that the Stock Subscription Agreement was entered into due to deceit or duress, it has been declared null as to plaintiff's interest. Plaintiff is essentially arguing that the valid November 30, 1984 agreement, which contains the 20% undiluted participation, should be resolved on the basis of a subsequent written contract which has been declared null. A subsequent written agreement which has been declared null cannot constitute the basis of an unfulfilled reciprocal obligation giving rise to the resolution of a valid, enforceable contract.

755 F. Supp. at 499 (footnote omitted) (emphasis added).

In his brief in support of his election of resolution as his remedy, the plaintiff makes little effort to present facts, law or argumentation on which the Court might reverse its prior finding that the inclusion of the buyout provision in the Stock Subscription Agreement did not constitute a breach of a reciprocal obligation of the Oral Contract. The plaintiff goes no further than reiterating his assertion that his control of an undiluted 20 percent equity share in HTP was a reciprocal obligation of the Oral Contract. He states:

> Dopp agreed to provide the contract to purchase the hotel complex and has as his consideration the promise offered in exchange by Pritzker. This was the 20% equity participation in the hotel complex and the reimbursement of the upfront money. As can readily be seen from the transcript, the structure and intent of the Oral Contract was for Dopp to have that interest in the acquiring entity. Such interest was clearly a principal reciprocal obligation.

Plaintiff's Memorandum at 14. The balance of the plaintiff's memorandum concerns the secondary issues of whether the allegedly reciprocal obligation was breached and whether he fulfilled his obligations under the Oral Contract.

Under the doctrine of "the law of the case," the Court's prior finding controls the issues of the plaintiff's entitlement to resolution absent extraordinary circumstances not present here. *Accord Arizona v. California*, 460 U.S. 605, 618 (1982), *reh'g denied*, 462 U.S. 1146 (1983) (citation omitted) ("when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") The Court may, in its discretion, reopen a point of law already decided; however, this "is a power which will necessarily be exercised sparingly, and only in a clear instance of previous error, to prevent manifest injustice." *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1940); *see also Piazza v. Aponte Roque*, 909 F.2d 35, 38 (1st Cir. 1990). In this case, the plaintiff has failed to articulate even the smallest reason to reverse *any* aspects of the Court's prior ruling.

Although the Court is inclined merely to incorporate the findings of fact and conclusions of law contained in its prior Opinion & Order, in an effort to comply strictly with the requirements of Rule 52 of the Federal Rules of Civil Procedure, the Court sets forth the following essential findings of fact and conclusions of law:

> 1. The Oral Agreement entered into between plaintiff Paul S. Dopp and defendant Jay Pritzker on November 30, 1984, provided that *Pritzker* would furnish all the money needed to exercise the right held by Dopp—through Code Hospitality—to acquire under a purchase agreement the stock or assets of the Dorado Beach Hotel Corporation (hereinafter "DBHC") in return for an 80 percent interest in a corporation ("HTP") that would be formed to acquire DBHC's stock as well as the awarding to a Hyatt affiliate of a long-term contract to manage the hotels.

2. The Oral Agreement entered into between plaintiff Paul S. Dopp and defendant Jay Pritzker on November 30, 1984, provided that *Dopp*—through Code Hospitality—would assign all his rights under the purchase agreement in return for a 20 percent interest in HTP and the repayment of all money expended by Dopp in anticipation of the closing.

3. The *reciprocal obligations* of the Oral Agreement assumed by *Pritzker* were the furnishing of the money needed to acquire the stock of DBHC, the reimbursing to Dopp of all the money he expended in anticipation of the closing, and the execution of an agreement giving Dopp a 20 percent interest in HTP.

4. The *reciprocal obligations* of the Oral Agreement assumed by *Dopp* were the assignment of his rights under the purchase agreement and the execution of an agreement giving Pritzker an 80 percent interest in HTP and giving to a Hyatt affiliate a long-term contract to manage the hotels.

5. Dopp and Pritzker did not agree, as a reciprocal obligation for Dopp, to sell and transfer to Pritzker the hotel's property in return for the obligations assigned by Pritzker hereinbefore stated.

6. Providing Dopp with an *unencumbered* 20 percent equity interest in HTP is *not* a reciprocal obligation of the Oral Agreement assumed by the defendant. Indeed, the plaintiff "fully expected that there would be some reasonable option" and therefore did not rely on the absence of an option clause to enter into the Oral Agreement.

7. The inclusion of the buyout provision in the Stock Subscription Agreement, although a breach of the Oral Agreement, did not constitute a breach of a reciprocal obligation of the Oral Agreement.

> 8. The plaintiff is not legally entitled to the resolution of the Oral Agreement, which remains in full force and effect.

Since the plaintiff is not legally entitled to resolution, his motion electing resolution as his remedy must be DENIED. The plaintiff must now make an election between the remedies of full damages, as set forth in this Opinion & Order, or annulment.

VII. Interest and Attorneys' Fees

Under the circumstances present in this case, the Court finds that legal interest and attorneys fees must by added to any monetary award enjoyed by Dopp. As to legal interest, Rule 44.3(b) of the Puerto Rico Rules of Civil Procedure provides, in pertinent part:

> Except [under circumstances not present here] . . . the court will . . . impose on the party that has acted rashly the payment of interest at the rate fixed by the [Finance] Board [of the Office of the Commissioner of Financial Institutions] by virtue of the previous subsection which is in effect at the moment the judgment is pronounced . . . from the time the claim is filed in actions for damages until the date the judgment is pronounced, to be computed on the amount of the judgment.

32 L.P.R.A. App. III R. 44.3(b). The rate fixed for the period from July 1, 1993 to December 31, 1993 is seven percent.

Pritzker has acted with temerity throughout these proceedings.[9] His conduct which gave rise to this action was found by the first jury to constitute *dolo*, which can be translated as deceit or duress and incorporates notions of willfulness and insidious machinations ("maquinaciones insidiosas"). *Accord* 31 L.P.R.A. § 3408. After the first trial in this case the Court determined that Pritzker's conduct had been obstinate.

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[9] Although the official translation of Rule 44.3 speaks of a party who acts "rashly," the term used in the official Spanish version of the rule is "temeridad," which is more appropriately translated as "temerity."

Accord Dopp v. HTP Corp., 755 F. Supp. at 503. He then appealed the first jury verdict, thereby causing significant additional expenditures by the plaintiff, only to have the amount of the verdict against him increased by the second verdict. Finally, the posture assumed by Pritzker since the entry of the second verdict, which boils down to an assertion that the plaintiff is entitled to a recovery of not more than $35,000, is intolerable. By assuming such an extreme position, which is an affront to the Court, Pritzker has complicated the Court's task in determining the validity of the jury's verdict. In short, throughout this litigation, the defendant has assumed an unyielding and unrealistic view which is the quintessence of temerity.[10] The Court therefore FINDS that pursuant to Rule 44.3(b) of the Puerto Rico Rules of Civil Procedure the plaintiff's recovery must be augmented at a rate of seven percent, compounded annually, for the period from which the complaint was filed—August 16, 1988—until the date of this Judgment, yielding pre-judgment interest in the amount of *$6,843,379.42* under the full damages theory.[11]

In addition, Rule 44.4(d) of the Puerto Rico Rules of Civil Procedure provides that "[w]here a party has been obstinate, the court shall in its judgment impose on such person the payment of a sum for attorney's fees." 32 L.P.R.A. App. III R. 44.4(d); *see also Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (the federal courts have recognized the Puerto Rican rule as a matter of substantive right). Rule 44.4(d) is not intended to provide court costs to a prevailing party. Rather, it is a special award imposed where a party has,

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[10] Furthermore, the Court instructed the jury to reach a verdict under the full damages theory measuring the plaintiff's damages as of the moment the Oral Contract was breached. As a result the jury's verdict under the full damages theory measured the injuries suffered by the plaintiff as of 1984. A judgment under the full damages theory that did not make some adjustment for pre-judgment interest would therefore not adequately compensate the plaintiff for the harm he suffered.

[11] The interest on $17 million dollars compounded annually is $1,190,000 in Year One (1988-89); $1,273,300 in Year Two (1989-90); $1,364,310 in Year Three (1990-91); $1,457,801.17 in Year Four (1991-92); and $1,559,847.25 in Year Five (1992-93).

in regard to an entire case or a specific issue, unreasonably held to a position regarding an issue of fact or law. *Accord Sanchez v. Cooperativa Azucarera*, 66 D.P.R. 346 (1946); *Prado v. Quiñones*, 78 P.R.R. 309 (1955). Such fees are awarded where a party has been "stubbornly litigious" so as to cause "unnecessary inconveniences and expenses." *Reyes v. Banco Santander de Puerto Rico*, 583 F. Supp. 1444, 1445 (D. Puerto Rico 1984); *see also Pereira v. I.B.E.C.*, 95 P.R.R. 28, 66 (1967). To be awarded fees under Rule 44, a party is not required to establish the fees expended under the terms otherwise required in the First Circuit. It is customary for the local courts to award fees under Rule 44 without taking evidence of attorney services. *Accord Pan American World Airways, Inc. v. Ramos*, 357 F.2d 341, 342 (1st Cir. 1966).[12]

The Court concludes that Pritzker has acted obstinately throughout this litigation and awards attorneys fees to Dopp, with due regard to the degree of the defendant's conduct and the work necessarily done by counsel for Dopp, in the amount of *$1.5 million*. Dopp's total recovery if he elects full damages as his recovery is therefore *$25,343,379.42*.

VIII. Litigated Credits

A. Background

During the period between the remand of the Main Case and its second trial, Dopp entered into a series of agreements with Bob Yari, Lincoln Realty, and Baird, Patrick & Co. (hereinafter "BPC") through which he received money in exchange for percentage share in his recovery in the Main Case. By an Opinion & Order dated March 5, 1993, the Court held that each of these agreements affected invalid transfers of "litigious credits" as defined in Article 1425 of the Puerto

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[12] The Court notes for the record, however, that in a similar case, *Lipsett v. University of Puerto Rico*, Civil No. 83-1516 (JP), which also was remanded from the circuit court, the Court, based on First Circuit procedure, entered an order of attorneys fees in the amount o $678,000. Given that this case involved approximately three times more work on the part of the attorneys, the Court feels that the fees it is awarding is more than reasonable.

Rico Civil Code, 31 L.P.R.A. § 3950, and that Pritzker is entitled, pursuant to Article 1425, to "extinguish [each] credit by reimbursing the assignee for the price the later paid for it, the judicial costs incurred by him, and the interest on the price from the day on which the same was paid." *Id.* The court left for another day the task of determining the amounts which Pritzker would be required to pay to each of the assignees and the percentage of Dopp's recovery in the Main Case which he would, in turn, be entitled to extinguish.[13] On June 9, 1993, the Court accepted evidence and argumentation regarding the issues which had been left undecided.[14] The Court now enters findings of fact and conclusions of law on these remaining issues.

B. Redemption of Litigated Credits under Puerto Rico Law

Upon making a showing under Article 1425 that the credit to be extinguished is "litigious" and that he exercised his right within the time provided for in the statute, a debtor "shall have the right to extinguish the [credit]." 31 L.P.R.A. § 3950 (emphasis added); *see also Matheu v. Colón*, 49 P.R.R. 365, 374 (1936) ("debtor shall be entitled to extinguish credits sold"). To do so, the debtor must pay the assignee of the credit "the price the later paid for it, the judicial costs incurred by him, and the interest on the price from the day on which the same was paid." 31 L.P.R.A. § 3950. The judicial costs which must be reimbursed include those necessary to

[13] On April 29, 1993, the Court entered Partial Judgment on the issues resolved in its Opinion & Order. Unfortunately, the Partial Judgment suffered from a clerical error. It stated that the Opinion & Order of the Court was dated *April 19, 1993*, while it was actually dated *March 5, 1993*. The Court ORDERS the Clerk of the Court to issue an amended Partial Judgment *nunc pro tunc* correcting this error.

[14] The Court originally referred to the June 9 proceeding as a hearing; however, it was a Non-Jury Trial. At the outset of the proceedings the defendants objected to having the case proceed without a jury, but this objection was rejected based on the fact that the defendants did not request a jury trial in a timely manner.

make whole the assignee for costs incurred prosecuting the underlying action.[15] The interest which must be paid is calculated at a rate of six percent pursuant to 31 L.P.R.A. § 4591.

C. Findings of Fact

After receiving all relevant evidence during the proceeding held on June 9, 1993, as well as additional relevant evidence submitted thereafter, the Court enters the following Findings of Fact:

Lincoln Realty

1. By a Judgment or Settlement Purchase Agreement dated June 26, 1990, Dopp sold to Lincoln Realty for the sum of $50,000.00 an eight percent in the Main Case to the extent such judgment or settlement would exceed $2 million, as well as an eight percent interest in any residual shares of HTP Corporation held by Dopp.[16]

2. Any other monies advanced by Lincoln Realty to Dopp were in the form of a loan and not in exchange for any interest in the Main Case.

3. Lincoln Realty makes no claim regarding court costs and expenses incurred in relation to the Main Case.

4. Pritzker seeks to extinguish Lincoln Realty's eight percent interest in any judgment in this case and makes no claim on its eight percent residual interest in Dopp's shares of HTP.

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[15] Defendant Baird, Patrick & Co. has argued that it is entitled to be reimbursed for expenses incurred in the Litigated Credits Case. Such a suggestion is flatly inconsistent with the language and purpose of Article 1425, which does not contemplate lengthy and costly resistance by an assignee to the debtor's right of redemption. The debtor's right is automatic and he is not required to subsidize an assignee's legal efforts to resist redemption.

[16] Assertions by Lincoln Realty regarding the timeliness of Pritzker's tender are rejected as unpersuasive and tardy.

5. At a rate of six percent, the amount of interest due on $50,000 from June 26, 1990, the date on which the amount was transferred to Dopp, until January 15, 1993, the date on which Pritzker deposited the funds with the Court, is $1,650.

6. By a Second Motion for Consignment of Funds dated January 15, 1993 (docket No. 8), which was accepted by the Court by an Order dated February 22, 1993 (docket No. 27), Pritzker consigned with the court an interest-bearing certificate of deposit issued by The Chase Manhattan Bank, N.A. in the face amount of $58,200 to be paid to Lincoln Realty in the event that the Court order Lincoln Realty's interest in the Main Case extinguished.

Baird, Patrick & Co.[17]

7. By a letter agreement dated October 16, 1991, Dopp sold to Baird, Patrick & Co. a five percent interest in his total recovery in the Main Case in return for a payment amounting to $100,000.00. The payment was made by BPC through a series of checks and wire transfers over the period from August 21, 1991 to December 18, 1991.

8. BPC has incurred no judicial costs which it can recover under Article 1425. Any costs which it has incurred have been in connection with the Litigated Credits case and are not recoverable.

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[17] On June 4, 1993, BPC filed an Answer to Pritzker's Amended Complaint which also set forth a Counterclaim alleging that Pritzker's actions in seeking to extinguish BPC's interest under Article 1425 constitute tortious interference with BPC's contract with Dopp. Since the Court has held that Pritzker is legally entitled to extinguish BPC's interest pursuant to Article 1425, BPC's counterclaim cannot stand and is hereby DISMISSED.

9. At a rate of six percent, the amount of interest due to BPC is: (i) $1,680 for the payment of $20,000 made on August 21, 1991; (ii) $3,000 for the payment of $40,000 made on October 16, 1991; (iii) $1,400 for the payment of $20,000 on November 15, 1991; and (iv) $1,296 for the payment of $20,000 on December 18, 1991—for a total of $7,376 in interest due.

10. By a Second Motion for Consignment of Funds dated January 15, 1993 (docket No. 8), which was accepted by the Court by an Order dated February 22, 1993 (docket no. 27), Pritzker consigned with the Court an interest-bearing certificate of deposit issued by The Chase Manhattan Bank, N.A. in the face amount of $97,300 to be paid to BPC in the event that the Court order BPC's interest in the Main Case extinguished. By a Motion for Additional Consignment of Funds dated May 27, 1993 (docket No. 71), Pritzker consigned with the Court an additional $10,000 to be paid to BPC.

Bob Yari

11. By an Agreement dated July 23, 1992, Bob Yari undertook to (i) advance an initial cash payment to Dopp of $250,000 to be used at Dopp's discretion and to be repaid from Dopp's line of credit and (ii) to cooperate with Dopp to establish a one year line of credit in Dopp's name.

12. The July 23 Agreement was not a "personal service" contract but rather an agreement to allow Yari joint control of the litigation of the Main Case.

13. Yari never paid Dopp $3 million, nor was he ever obligated to pay Dopp $3 million. Yari performed both of his obligations under the July 23 Agreement by paying to Dopp $250,000 as an initial cash payment and by offering his personal guaranty to two banks in an effort to secure a line of credit in Dopp's name. Despite Yari's efforts, a line of credit could not be secured. The result

being that Yari was not indebted to banks in the sum of $3 million as the original contract intended.

14. Paragraph five of the Agreement provides that any monetary proceeds from any final judgment of the Court in the Main Case, after the deduction of any sums due Dopp's attorneys (Ledesma, Palou & Miranda) for services rendered in the case, shall be distributed as follows: (i) first, to repayment of all indebtedness in relation to the line of credit to have been obtained in Dopp's name; (ii) second, $2,500,000 to Yari; (iii) third, $12,000,000 to Dopp; (iv) fourth, $7,000,000 to Yari; and (v) fifth, the remaining amount, if any, to be divided equally between Dopp and Yari.

15. On September 24, 1992, Dopp and Yari entered into a signed, written modification of their Agreement, which called for Yari to advance to Dopp, in an amount to be determined and to be negotiated by the parties in good faith, funds necessary to allow Dopp's prosecution of the Main Case to proceed diligently. The modification ratified that the parties "fully intend to move forward with the present [July 23] Agreement despite the fact that a line of credit may not be obtainable."

16. Yari complied with all requests for funds by Dopp. Upon execution of the modification, he advanced to Dopp a requested additional $50,000. Shortly after receiving a request for additional funds from Dopp on November 5, 1992, Yari advanced to him an additional $100,000 (in two installments, one of $80,000 and another of $20,000). In early December 1992, Yari advanced to Dopp an additional $50,000 to cover litigation expenses. In March 1993, Yari made one final advance to Dopp in the amount of $50,000, again to cover litigation expenses.[18]

[18] On May 14, 1993, Yari filed, along with his Answer to Pritzker's Amended Complaint, a Cross-Claim against Dopp seeking declarations regarding their relationship. The Cross-Claim has not been pursued in

17. The final advance was made by Yari after Pritzker filed the Litigated Credits Case based on Yari's conclusion that he was under a continuing obligation to advance monies to Dopp under the September 24 modification.

18. The Dopp/Yari Agreement did not create a partnership between the parties. Rather than establishing an association in which the parties were co-owners of Dopp's potential recovery in the Main Case with the intent to share the profits (*see* 2 Cal. Stat. Ann § 15006; *Cochran v. Board of Supervisors*, 149 Cal. Rptr. 304 (Cal. App. 1978)), the Agreement merely set forth the extent of the interest in the Main Case purchased by Yari individually, which was contingent on the amount of the recovery.

19. At a rate of six percent, the amount of interest due to Yari is: (i) $7,500 for the advance of $250,000 made on July 23, 1992; (ii) $1,000 for the advance of $50,000 made on September 24, 1992; (iii) $1,000 for the advance of $100,000 made on November 5, 1992; and (iv) $250 for the advance of $50,000 made in early December 1992—for a total of *$9,750* in interest due.

20. Yari has not proven any judicial costs for which he is entitled to reimbursement.[19]

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any fashion and it has not been established whether the Court has or would entertain jurisdiction over the claim. It should be noted, however, that Findings of Fact Nos. 15 and 16 effectively dispose of Yari's Cross-Claim in his favor, at least for purposes of this action.

[19] On July 16, 1993, Yari filed a Motion Submitting Legal Invoices (docket No. 101) which purportedly reflects the work performed in the prosecution of the Main Case. The submission is, however, an unedited printout which collects charges for a number of legal services, some of which are not related to the prosecution of the Main Case. Moreover, Yari has made no attempt to collate the information and propose to the Court an amount to be reimbursed. It is simply impossible for the Court to sort out Yari's request for attorney's fees, which is unfortunate because it appears that to at least some degree he is entitled to fees.

21. By a Motion for Consignment of Funds dated December 18, 1992 (docket No. 4), which was accepted by the Court by an Order dated December 28, 1992 (docket No. 5), Pritzker consigned with the Court an interest-bearing certificate of deposit issued by The Chase Manhattan Bank, N.A. in the face amount of $464,000 to be paid to Bob Yari or the Dopp/Yari partnership in the event that the Court order its interest in the Main Case extinguished. By a Second Motion for Additional Consignment of Funds dated June 1, 1993 (docket No. 75), Pritzker consigned with the Court an additional $51,500 to be paid to Yari or the Dopp/Yari Partnership.

Ledesma, Palou & Miranda

22. By a Ratification and Assignment dated March 27, 1990, Dopp agreed to pay Ledesma, Palou & Miranda, for legal services rendered in Civil Case No. 88-1420, 25 percent of all amounts in excess of $666,000 recovered by judgment, settlement or otherwise in Civil Case No. 88-1420.

23. By an Amendment to the Ratification and Assignment dated February 6, 1993, Dopp agreed to pay Ledesma, Palou & Miranda, for services rendered in both Civil Case No. 88-1420 and Civil Case No. 92-2835, 25 percent of all amounts awarded by judgment, settlement or otherwise in Civil Case No. 88-1420.[20]

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[20] The Amendment states that Dopp will pay his attorneys "twenty five percent (25%) of all amounts awarded by judgment, settlement or otherwise on the Pritzker Litigation." The "Pritzker Litigation" is defined within the instrument as Civil Case No. 88-1420.

D. Redemption of Credits Transferred Under Yari Agreement

At various stages of the Litigated Credits Case, the defendants have argued that Article 1425 does not apply to the various agreements. When opposing Pritzker's motion for partial summary judgment, the defendants argued that Article 1425 did not apply because (i) the agreements did not involve the sale of litigated credits because they transferred only an interest in litigation, not title over Dopp's right, and (ii) the intention of the parties in entering into the contracts was only to provide Dopp with funds to continue prosecuting his case, not to speculate in ongoing litigation. When opposing Pritzker's motion, and again when defendant Dopp filed his own motion for summary judgment, the defendants argued that Pritzker failed to exercise his rights under Article 1425 within the period provided by the statute. All of these arguments were rejected by the Court. Many were brought forward after the Court ruled on Pritzker's motion for partial summary judgment and were rejected based on their untimely presentation. Others related specifically to the Dopp/Yari agreement, similarly belated, were nonetheless entertained in the interests of justice. The Court rules on these arguments in the pages that follow.

1. Yari's Fulfillment of His Obligations

Dopp contends that Yari undertook an obligation to provide a $3 million line of credit to Dopp, that he failed to provide such a line of credit, and that he therefore only partially performed his obligations under their agreement. Based on this contention, Dopp argues that Yari's share of the proceeds from the Main Case—and consequently Pritzker's right of redemption in regard to Yari's share—should be reduced to one-sixth of what Yari was supposed to receive (since he only provided Dopp with $500,000 in cash).

The contention that Yari undertook to provide a $3 million line of credit to Dopp is refuted by Findings of Fact Nos. 11,

13 and 16 set forth above.[21] Under the July 23 Agreement, Yari assumed only the obligation to "cooperate" with Dopp to establish a one year line of credit in Dopp's name by serving as a guarantor of the line of credit. The fact that Yari was not required to *provide* a $3 million line of credit is confirmed by the fact that after his efforts to do so were unavailing the parties entered into the September 24 modification which ratified that the parties "fully intend to move forward with the present [July 23] Agreement despite the fact that a line of credit may not be obtainable." Such an agreement between Dopp and Yari is plainly inconsistent with a claim that Yari's failure to obtain a line of credit constituted a breach of their original Agreement.

After Yari was unable to secure a line of credit for Dopp, the parties jointly and voluntarily took steps to alter their agreement. The modification which they executed provided that Yari's obligations would be altered so that he would be required to provide cash advance to Dopp—rather than securing a $3 million line of credit—in an amount likely to total slightly more than $1 million. A September 16, 1992 correspondence from Dopp to Yari suggested that since Yari's obligations were to be altered, the schedule of payments from the profits obtained in the Main Case should also be altered. The suggestion in Yari's letter is consistent with the parties' original intentions and the agreement's basic purpose. The fact that Dopp and Yari agreed to alter the terms of their original agreement did not alter its basic purpose—to provide Yari with a share of the proceeds from the Main Case in return for consideration provided to Dopp.

The relationship between Yari and Dopp is complicated and was in flux as the Litigated Credits Case progressed; however,

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[21] Dopp's contention that his contract with Yari was a "personal services" contract is disposed of by Finding of Fact No. 11 and the Court sees no need to further discuss the issue. The related contention that by redeeming the credit obtained by Yari Pritzker somehow assumed Yari's continuing obligation to fund Dopp's lawsuit against Pritzker is absurd and flatly inconsistent with the purposes of Article 1425.

when viewed through the only relevant lends in this case, Article 1425, its effects are quite simple. The July 23 Agreement, standing alone and as amended by the September 24 modification, is an agreement falling under the terms of Article 1425. Pritzker has a right to redeem the interest obtained by Yari under the agreements for the price he paid plus legal costs and interest. As the relationship between Dopp and Yari now stands, Yari has complied with all of his obligations under his agreements and would be entitled to those proceeds promised him under the terms of the Agreement as qualified hereinafter. By making a valid tender of the amounts paid by Yari, with court costs and interest, Pritzker is entitled to extinguish Dopp's recovery in the Main Case in an amount equal to the proceeds to which Yari was otherwise entitled, adjusting the percentages to reflect the lesser obligation assumed by Yari, if any, and the monies which were actually disbursed by Yari.

2. Pritzker's Obligations

At an earlier stage in this case, Yari asserted that Pritzker could not utilize Article 1425 to extinguish the rights created under the Dopp/Yari agreement because of its "executory" nature, involving continuing obligations to provide litigation funding, advice and consultation which Pritzker could not assume. This argument was rejected by the Court through a ruling issued from the bench during the June 10 proceedings.[22] Now Yari asserts that even if Article 1425 is appropriately applied to executory contracts Pritzker failed to make a proper tender to Yari by failing to assume his obligations to fund Dopp's litigation. This latest defense must fail.

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22 The Court held:

> If the Court were to rule that Article 1425 did not apply to executory contracts or installment contracts, Article 1425 would be dead. All parties interested in speculating in litigation would arrange their agreements accordingly. This Court is not in the business of wiping an important statute, reflecting an important public policy, off the books.

Under Article 1425, Pritzker's reimbursement of the price paid by Yari, plus interest and expenses, extinguishes the litigated credit. Contrary to the defendants' claims, Pritzker does not become "subrogated" to Yari's rights and obligations. *See* Garcia Cantero, *Comentarios al Codigo Civil y Compilaciones Forales*, Dirigidas por Manuel Albadeljo (Revista de Derecho Privado 1980) Tomo XIX p. 699-700 (commentary on Article 1535 of the Spanish Civil Code). Pritzker does not assume Yari's obligations and is required to do no more to redeem the credit than to reimburse the price actually paid, plus interest and expenses. The defendants argue that if Pritzker is not required to assume Yari's ongoing responsibilities, Dopp is deprived the benefit of his bargain with Yari. This may be so. But this situation is a direct result of the fact that Dopp and Yari entered into an agreement which created an interest which Pritzker has a right to redeem under Puerto Rico Law.[23]

3. Pritzker's Redemption

Pritzker's essential allegation that the agreements between Dopp and his investors are subject to the provisions of Article 1425 has weathered a storm of counter arguments.[24] The Court has rejected all of these arguments and held steadfast to its finding that the agreements *are* subject to redemption under Article 1425. Nonetheless, upon viewing together sev-

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[23] The courts of Louisiana, in applying the provision of the Louisiana Civil Code which is analogous to Article 1425, have reached the same conclusion. *Accord Calderera v. O'Carrol*, 551 So. 2d 824, 826 (La. App. 1st Cir. 1989), *cert. denied*, 556 So.2d 60 (1990) ("The code article does not speak in terms of what the seller of the litigious right has expectations of receiving. It only speaks of reimbursement to the purchaser of the price."); *Martin Energy Company v. Bourne*, 598 So.2d 1160, 1162 (La. App. 1st Cir. 1992) (where litigated credit sold for $10 and "other valuable services," redeemer need only reimburse purchaser for the $10 actually paid).

[24] Most of these counter arguments are collected in a Motion for Reconsideration filed by Dopp on July 27, 1993 (docket no. 107). This motion, which simply rehashes defenses previously considered and rejected, is hereby DENIED.

eral of the arguments made by Dopp and Yari in regard to their agreement, the Court finds that this is one of the rare situations in which the whole of their position may be worth a bit more than the sum of its parts. Although none of the arguments, standing alone, is sufficient to undermine the application of Article 1425 in this case, they do present important matters which must be taken into account. First, in response to Pritzker's Motion for Summary Judgment filed in January, both Dopp and Yari argued that their agreement should not be deemed to be covered by Article 1425 because it was entered into for the valid purpose of providing Dopp with funds to maintain his action against Pritzker. The Court rejected this argument on grounds that "Article 1425 itself reflects a policy decision to prohibit all transfers of litigious credits, regardless of the possibly valid reasons for consummating such transfers." Opinion & Order of March 5, 1993, at 14. The Court's ruling was also based on several other concerns which it did not at the time articulate. First, the Court was mindful of the possibility that interpreting an exception to Article 1425 for agreements intended "to provide funds to maintain litigation" would swallow up the rule itself. In addition, the court was wary of the possibility that, if accepted, such an exception could be subject to abuse, as it would likely be asserted in all cases in which an agreement is alleged to be subject to the terms of Article 1425, regardless of whether the true intention of the parties to the agreement was to provide funds for litigation. The Court remains confident that these concerns dictate that such an exception seeking to block the application of Article 1425 in its entirety must not be recognized. Nevertheless, the Court is sensitive to Dopp's need to obtain funds to maintain his action against Pritzker.[25] Moreover, it is undisputed in this case that at least two of the payments made by Yari to Dopp—the advance of $50,000 in early

[25] Dopp has struggled, and will continue to struggle, in his efforts to obtain financing for this litigation. Pritzker is a billionaire who could never be forced to relent in his defense. This litigation is almost sure to continue and Dopp will again be faced with the need for funds.

December 1992 and the advance of $50,000 in March 1993—*were* made to pay specific litigation expenses.

Second, in this Opinion & Order, the Court has rejected Dopp's allegation that Yari failed to perform fully his obligations under their agreement. *See supra* Part VIII.D.1. Nonetheless, although Yari technically complied with the terms of his agreement with Dopp, he did not succeed in providing what he originally intended. As a result, Dopp never received what he hoped he had bargained for under the agreement. This situation was complicated by two matters: first, the agreement modified in what appears to have been an incomplete fashion; second, it called for continuing performance by Yari which was interrupted by the filing of the Litigated Credits Case. If the relationship between Dopp and Yari had proceeded without interference, it appears they would have settled on an agreement through which Yari would have provided Dopp with cash advances worth slightly more than $1 million. Because it did not proceed without interference, this agreement was never formalized and Yari provided only $450,000.

The Court has struggled mightily with the question of how to deal with these matters. Article 1425 and its construing case law provides no guidance. The Dopp/Yari agreement is far outside of the heartland of agreements contemplated by the legislature when it enacted Article 1425. It is likely that the lawmakers did not envision the possibility of a case like this. Property and assets have traditionally been mortgageable to protect and preserve their value. In this case, the lawsuit's worth is an asset which requires expenditures for the services of attorneys and experts, as well as for other general costs of litigation to preserve its value. To apply Article 1425 without allowing for adjustments to reflect expenditures that have permitted the lawsuit to survive would be to deplete and maybe extinguish altogether the value of the lawsuit; this could not have been the intention of the legislation. The Court therefore can refer only to the general intention of the legislature as reflected in the statute which it passed. Based on these prin-

ciples, the Court FINDS that Pritzker cannot be allowed to redeem the entire amount of the credit transferred by Yari. Pritzker cannot be unjustly advantaged because of the peculiar facts of this case. The interests of justice dictate that his right to redeem the credit held by Yari be reduced by half.

E. Conclusions of Law

Based on the foregoing legal standards and Findings of Fact, the Court enters the following Conclusions of Law:

1. In return for tendering to Lincoln Realty $51,650 to cover the principal amount paid by Lincoln Realty to Dopp plus legal interest, Pritzker is entitled to extinguish eight percent of Dopp's recovery in the Main Case to the extent it exceeds $2 million—or *$1,867,470.35* of Dopp's recovery under the full damages theory.[26]

2. In return for tendering to Baird, Patrick & Co. $107,376 to cover the principal amount paid by BPC to Dopp plus legal interest, Pritzker is entitled to extinguish five percent of Dopp's recovery in the Main Case—or *$1,267,168.97* of Dopp's recovery under the full damages theory.[27]

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[26] Dopp's allegations that Section 4(b) of this agreement with Lincoln Realty made its eight percent interest subject to the prior subtraction of the 25 percent interest held by Ledesma Palou & Miranda ("LPM") through a contingency fee agreement is rejected based on the plain language of the contract. His allegation that Pritzker's rights are subject to a decision in a case filed in New Jersey regarding the Dopp/Lincoln Realty Agreement is also rejected. First, the contention has not been presented in a fashion sufficient to allow the Court to make a meaningful determination of its merits. Moreover, it appears clear that any decision rendered by the New Jersey court will not consider the agreement in the light of Article 1425 and is therefore irrelevant to this case.

[27] Dopp's contention that BPC's five percent share must be determined after subtracting LPM's contingent fee, Lincoln Realty's share and Dopp's litigation expenses, is also rejected based on the plain language of the contract. The agreement is unambiguous on this point and any attempt to alter its terms based on other correspondence between the parties is not permitted.

3. Under the terms of the Amendment to Ratification and Assignment, Ledesma, Palou & Miranda are entitled to recover 25 percent of the verdict and Judgment in this case, Civil Case No. 88-1420—or $6,335,844.85.[28]

4. In return for tendering to Bob Yari $450,000 to cover the principal amount paid by Yari to Dopp (prior to Prtizker's prosecution of the Litigated Credits Case) plus legal interest and fees, Pritzker is entitled to extinguish one-half of the $2.5 million that would have been due to Yari pursuant to Paragraph 5(ii) of the Dopp/Yari Agreement, or $1.25 million, and one-half of the $4,507,534.57 million that would have been due Yari under Paragraph 5(iv) of the Agreement, or $2,253,767.29[29]—for a total of *$3,503,767.29* under the full damages theory.

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[28] Pritzker has argued that LPM's fee cannot be computed based on Dopp's full recovery in the Main Case because under the terms of Article 1425 the credits which Pritzker can redeem are literally *extinguished* from Dopp's recovery. The effect is that a portion of Dopp's recovery simply never existed. In addition, Pritzker argues that LPM cannot collect on a contingent basis a percentage of money not actually realized by their client. The Court rejects this proposition. The plain language of the revised contingency agreement states that LPM is to recover 25 percent of Dopp's recovery in the "Pritzker litigation," which is defined as Civil Case No. 88-1420 (JP). Furthermore, the revised agreement could not have been otherwise arranged. It would have been nonsensical for LPM, having already contracted for a contingent fee based on Dopp's recovery in the Main Case, to assume additional responsibilities in the Litigated Credits Case and then allow its fee to be dictated by the results in the later case, which had the potential only of reducing Dopp's recovery. LPM would have been agreeing to assume more work and at the same time receive less money.

[29] Dopp's total recovery in Civil Case No. 88-1420 is $25,343,379.42. Under the terms of the Dopp/Yari Agreement, legal fees were to be deducted first. Subtracting the legal fees of $6,335,844.85 yields a net of $19,007,534.57. The provisions of Paragraph 5(i) are inoperative since the line of credit was never secured. The first $2.5 million was to go to Yari. The next $12 million was to go to Dopp. The remainder above $14.5 million was to to go to Yari to the extent it did not exceed $7 million dollars. Since the remainder is 4,507,534.57, which is less than $7 million, the entire amount would have gone to Yari.

5. Pritzker can extinguish Dopp's recovery in the Main Case in the total amount of *$6,638,406.61.*

6. After the payment of $6,335,844.85 to Ledesma, Palou & Miranda, Dopp's individual recovery is *$12,369,127.96* (plus the amounts he has already received from the investors).[30]

IX. Summary

The Court, in the foregoing Opinion & Order, has issued the following decrees:

1. Pritzker's Motion to Consolidate (Main Case docket No. 545) is hereby GRANTED.

2. Pritzker's Motion for Relief from Judgment (Main Case docket No. 537) is hereby GRANTED in part.

3. Pritzker's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial (Main Case docket No. 538) is hereby DENIED.

4. Dopp's Motion to Alter or Amend the Judgment as to the Full Damages Remedy (Main Case docket No. 540) is hereby DENIED.

5. Dopp's Motion Electing Resolution as his Remedy (Main Case docket No. 552) is hereby DENIED as he is not entitled to resolution as a matter of law.

6. Pritzker, because of his temerity in this litigation, is hereby ORDERED to pay Dopp pre-judgment interest in the amount of $6,843,379.42 if Dopp elects full damages as his remedy.

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[30] The resolution of the Litigated Credits Case required a determination by the court of the amount owed by Dopp to his attorneys. As a result, the amount of the attorneys fees payable to LPM has become an integral part of the Court's business. The Court envisions that it will enter a Judgment which will include the payment of attorneys fees to LPM.

7. Pritzker, because of his temerity in this litigation, is hereby ORDERED to pay Dopp attorneys fees in the amount of $1.5 million.

8. The Court ORDERED the Clerk to enter a Judgment *nunc pro tunc* correcting an error in the Court's April 29 Partial Judgment.

9. Dopp's Motion for Reconsideration dated July 27, 1993, is hereby DENIED.

10. In return for tendering to Lincoln Realty $51,650 to cover the principal amount paid by Lincoln Realty to Dopp plus legal interest, Pritzker is entitled to extinguish eight percent of Dopp's recovery in the Main Case to the extent it exceeds $2 million—or *$1,867,470.35* of Dopp's recovery under the full damages theory.

11. In return for tendering to Baird, Patrick & Co. $107,376 to cover the principal amount paid by BPC to Dopp plus legal interest, Pritzker is entitled to extinguish five percent of Dopp's recovery in the Main Case—or *$1,267,168.97* of Dopp's recovery under the full damages theory.

12. Under the terms of the Amendment to Ratification and Assignment, Ledesma, Palou & Miranda are entitled to 25 percent of the verdict and Judgment in this case, Civil Case No. 88-1420—or *$6,335,844.85*.

13. In return for tendering to Bob Yari $450,000 to cover the principal amount paid by Yari to Dopp plus legal interest and fees, Pritzker is entitled to extinguish one-half of the $2.5 million that would have been due to Yari pursuant to Paragraph 5(ii) of the Dopp/Yari Agreement, or $1.25 million, and one-half of the $4,507,534.57 million that would have been to Yari under Paragraph 5(iv) of the Agreement, or $2,253,767.29—or a total of *$3,503,767.29* under the full damages theory.

X. Remaining Proceedings

The Court hereby enters the following Orders regarding the proceedings which remain in this litigation:

1. Dopp is hereby ORDERED to file, on or before September 24, 1993, a Supplemental Motion Regarding Election of Remedies stating whether he intends to:

a. Elect annulment as his remedy and thereby have the Court enter an Order annulling the Stock Subscription Agreement by which he would be entitled to 12 unencumbered shares of BTP Corporation and no other monetary relief other than the attorneys fees ordered in Part VII *supra*.

b. Elect full damages as his remedy and thereby be entitled to an award in the amount of $25,343,339.42, subject to Pritzker's right to extinguish the interests held by Yari, BPC and Lincoln Realty and other provisions as described above.

2. If Dopp elects full damages as his remedy, Pritzker is ORDERED to exercise his right to redeem the interests purchased by Yari, BCP and Lincoln Realty, on or before October 15, 1993.[31]

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 9th day of September, 1993.

JAIME PIERAS, JR.
JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

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[31] If Dopp elects full damages and Pritzker exercises his rights under Article 1425, the Court will enter Judgment under the following terms. Pritzker will be order to tender to Dopp the amount of $12,369,127.96 and to tender to LPM the amount of $6,335,379.42. The Clerk of the Court will be ordered to disburse to Lincoln Realty $51,650, to BPC $107,376 and to Yari $450,000 while returning to Pritzker the excess of the funds consigned by him, along with any accrued interest.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 92-2825 (JP)

JAY PRITZKER

Plaintiff

—vs.—

BOB YARI, *et al.*

Defendant

OPINION & ORDER

The Court has before it the Motion for Partial Summary Judgment filed by plaintiff Jay Pritzker on January 15, 1993 (docket No. 7), and the Motion to Dismiss for Lack of Personal Jurisdiction filed by defendant Baird, Patrick & Co. on January 20, 1993 (docket No. 11). For the reasons set forth below, the plaintiff's motion is hereby GRANTED and the defendant's motion is hereby DENIED.

I. Background

On October 4, 1991, the First Circuit vacated in part the Judgment of this Court in *Dopp v. HTP Corporation*, Civil Case No. 88-1420 (JP). In its decision, the circuit court left undisturbed the findings of liability against defendant Jay Pritzker but remanded the case for further proceedings to determine the appropriate amount of the damages to be awarded to plaintiff Paul Dopp. The case has since that time

proceeded through lengthy, costly, and hotly contested discovery.

In a set of interrogatories propounded by Pritzker, Dopp was asked whether he had entered into any agreements assigning or conveying his interest in HTP Corporation or the Dorado Beach Hotel Corporation ("DBHC"). The ownership and control of these entities are at the heart of the dispute in the litigation. Dopp responded:

> I have not assigned or conveyed my interests or rights in HTP or DBHC. I have been forced to procure financing to meet some of the litigation and personal expenses that I have incurred during the years of this intense litigation and in connection therein. In addition to the fee arrangement with my attorneys, Ledesma, Palou & Miranda, I have assigned interests in the proceeds of this litigation to Lincoln Realty, Inc., Baird, Patrick & Co., Inc., First Fidelity Bank, N.A., and Bob Yari.

Copies of each of these agreements were provided to Pritzker, who believes that the agreements involving Bob Yari, Lincoln Realty, and Baird, Patrick & Co. (hereinafter "BPC") effect invalid transfers of "litigious credits," as that term is defined in Article 1425 of the Puerto Rico Civil Code, 31 L.P.R.A. § 3950. By letters dated October 16, 1992, to Yari, Lincoln Realty, BPC, and Dopp, counsel for Pritzker, invoking Article 1425, offered to tender an amount to each in exchange for all rights acquired in Civil Case No. 88-1420.[1] In a Motion

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[1] The letter to Lincoln Realty offered $50,000.00, plus interest and costs, in exchange for its eight percent interest. The letter to BPC offered $100,000.00, plus interest and costs, in exchange for its five percent interest. The letter to Yari offered payment of all amounts paid or guaranteed on behalf of Dopp, plus any interest and any judicial costs, in return for all rights acquired by Yari. The letter to Yari and Dopp offered to their partnership all amounts paid or guaranteed on behalf of Dopp, plus any interest and any judicial costs, in return for all rights acquired by the partnership. The offers were reaffirmed on December 7, 1992, with a further provision that the failure to accept the offer by December 11, 1992, would constitute a rejection of the offer.

Regarding Litigious Credit dated October 16, 1992, in Civil Case No. 88-1420, Pritzker informed the Court that if any of the tenders were refused he would come before the Court seeking an appropriate order. The issue was eventually placed before the Court by Dopp, who filed an Urgent Motion seeking a declaration that the agreements did *not* involve litigious credits and were not subject to redemption. The Court denied Dopp's motion by an Order dated December 2, 1992, on grounds that any effort by Pritzker to invoke Article 1425 would have to be advanced in a separate proceeding.

Pritzker then filed, on December 11, 1992, the instant action, which, by the vagaries of fate, was also assigned to this Judge. Pritzker's amended complaint in this case sets forth the facts summarized above, which are undisputed. Its central allegations describe the three agreements at issue, which can be summarized as follows:

1. *Lincoln Realty., Inc.*—By an Assignment and Promissory Note, both dated June 26, 1990, Lincoln Realty loaned to Dopp $200,000.00 in return for an assignment by Dopp to Lincoln Realty of "his share of those certain proceeds of any settlement, sums recovered by a judgment or otherwise" in connection with this action, in an amount not to exceed the principal balance of the Note, plus interest and other expenses. By a Judgment or Settlement Purchase Agreement also dated June 26, 1990, Dopp sold to Lincoln Realty for the sum of $50,000.00 an eight percent interest in any judgment or settlement in favor of Dopp in this action to the extent such judgment or settlement exceeds $2 million.

2. *Baird. Patrick & Co.*—By a letter agreement dated October 16, 1991, Dopp sold to BPC a five percent interest in his total recovery in this action in return for a payment amounting to $100,000.00. Dopp guaranteed a payment to BPC of $250,000.00 if this action was resolved by December 31, 1991, or $500,000.00 if this action was resolved after that date.

3. *Bob Yari*—By an Agreement dated July 23, 1992, Yari agreed to pay Dopp $250,000.00 and to establish at either the Summit Trust Company or an alternate bank selected by Dopp a $2,500,000.00 line of credit in Dopp's name. In return Dopp agreed:

> (i) to execute an assignment of Civil Case No. 88-1420 to the bank as security for the line of credit, including a provision for distribution of any excess funds collected;
>
> (ii) that any proceeds from Civil Case No. 88-1420 will be distributed as follows: first, to repay all indebtedness to the bank; second, to pay Yari an amount equal to the amount of the line of credit; third, to make a flat $12 million dollar payment to Dopp; fourth, to make a flat $7 million payment to Yari and finally, to distribute any remaining proceeds equally between Dopp and Yari.

Dopp also agreed not to settle or compromise the action without obtaining the prior written consent of Yari and agreed to confer jointly with Yari regarding the prosecution of the case. Both parties "acknowledge[d] that the Action entails a degree of risk and that there may be no Proceeds to disburse."

On December 18, 1992, Pritzker consigned to the Court an interest-bearing certificate of deposit ("CD") in the amount of $464,000.00 to be paid to the Dopp/Yari partnership to extinguish its interest in this litigation. On January 15, 1993, plaintiff consigned to the Court two additional CDs in the amounts of $58,200.00 and $97,300.00 to extinguish the interests of Lincoln Realty, Inc. and BPC, respectively. On that date plaintiff also filed the Motion for Partial Summary Judgment now before the Court. On January 20, 1993, BPC filed its Motion to Dismiss.

II. Discussion

A. BPC's Motion to Dismiss

It is well settled that when a court's jurisdiction over a defendant is challenged the plaintiff bears the burden of showing that jurisdiction exists. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9, 10 (1st Cir. 1986). Where jurisdiction is addressed without an evidentiary hearing, the plaintiff's burden is met where he makes a *prima facie* showing of jurisdiction supported by specific facts alleged in the pleadings, affidavits, and exhibits. *Accord Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 979 (1st Cir. 1986) (citations omitted). In a diversity case such as this, two prerequisites must ordinarily be met in order for a court to exercise personal jurisdiction over a defendant: (i) the state long arm statute must confer jurisdiction over the defendant and (ii) the assertion of jurisdiction must be in accordance with the due process clause of the United States Constitution. *Accord Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 667 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). In its definitive opinion on the reach of Puerto Rico's long-arm statute, however, the Supreme Court of Puerto Rico held that jurisdiction extends to all cases in which it is constitutionally permissible. *Accord A.H. Thomas Co. v. Superior Court of Puerto Rico*, 98 P.R.R. 864, 870 n.5 (1970). Under these circumstances, the analysis of the requirements of state law jurisdiction is "telescoped" into the due process analysis. *Accord Dalmau Rodriguez, supra*, at 12.

The Supreme Court has established a long-standing rule that personal jurisdiction over a defendant who is not present within the territory of the forum is constitutionally valid only where the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463

(1940)). BPC contends that it does not have sufficient minimum contacts with Puerto Rico to support the assertion of personal jurisdiction over it in this action.

It is undisputed that BPC is a resident of New York; that, aside from purchasing a five percent interest in Civil Case No. 88-1420, it has never conducted any business in Puerto Rico; that it has never had an office or agent in Puerto Rico; and that the agreement it entered into with Dopp was executed in New York and it is to be performed in New York. It is also undisputed that the agreement it entered into with Dopp involved the purchasing of an interest in a case being tried in the District of Puerto Rico and that BPC has manifested a continuing interest in the conduct of the litigation.

Given BPC's extremely limited contact with Puerto Rico, Pritzker recognizes that the defendant's connection with the forum is not sufficiently "systematic and continuous" to support the assertion of "general" personal jurisdiction. *See, e.g., Milliken v. Meyer*, 311 U.S. 457 (1940) (defendant's domicile in forum state justifies any assertion of personal jurisdiction); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) ("systematic and continuous" activities of defendant within forum sufficient to establish jurisdiction in all cases). Pritzker asserts, however, that the facts in this case meet the requirements for "specific" personal jurisdiction which have been established in this circuit. Those requirements are: (i) that the claim underlying the litigation directly arise out of or relate to the defendant's forum state activities; (ii) that the defendant's in-state activities represent a purposeful availing of the privilege or conducting activities in the forum state and make the defendant's involuntary presence before the courts of the forum state foreseeable; and (iii) that the assertion of jurisdiction is otherwise reasonable. *Accord United Electrical Workers v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992).

The assertion of personal jurisdiction over BPC in this case is not an uncomplicated matter. BPC has only a single business contact with Puerto Rico—its purchase of a five percent

stake in any recovery received by Dopp in Civil Case No. 88-1420. The record reflects no facts indicating that in purchasing this stake BPC conducted any activities "in" Puerto Rico. Indeed, an argument might be made that BPC conducted *no* activities within Puerto Rico upon which specific jurisdiction can be grounded. *Accord International Shoe*, *supra* (a defendant cannot be subject to jurisdiction in a state with which he has no contacts). The Court is aware of a host of recent cases in which a plaintiff's assertion of specific jurisdiction was rejected despite the presence of what appear to have been more pervasive contacts with the forum.

Nonetheless, a single transaction of business in a state by a non-resident may be a sufficient basis for the assertion of long-arm jurisdiction. The leading Supreme Court case dealing with jurisdiction predicated on a single transaction of business is *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). In that case, the Court ruled that a California court had personal jurisdiction over a Texas insurance company which, aside from having reinsured the life of a single California resident, had conducted no business in California. The company, which was sued for failure to pay off a claim, maintained no office or agent in California and had not conducted any business in California apart from the issuance of the one policy. A unanimous Court nonetheless held that the due process requirements for jurisdiction in the California courts had been met. The Court stated that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State." *Id.* at 223 (citations omitted). The Court went on to explain that such an assertion of jurisdiction was supported because "[i]t cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Id.*

As most commentators have noted, the broad view of personal jurisdiction articulated in *McGee* was curtailed in the next major Supreme Court case dealing with the issue, *Hanson v. Denkla*, 357 U.S. 235 (1958). *Accord* Friendenthal, et

al., *Civil Procedure* ¶ 3.11 (1985); 4 Wright & Miller, *Federal Practice and Procedure* § 1067 (1987). A single act is now considered to be a sufficient basis for the assertion of jurisdiction only where the transaction has sufficient contact with the forum state and the defendant has purposefully availed himself of the privilege of conducting activities in the forum state. *Accord Purdy Co. v. Argentina*, 333 F.2d 95 (7th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965).

The Court nonetheless finds that each of the requirements for special personal jurisdiction based on a single act are present in this case. The claim underlying this case arises directly out of the activities which constitute BPC's contacts with Puerto Rico. BPC's contact with Puerto Rico, although not a physical contact, is purposeful business contact with the forum through which it has availed itself of the privileges of conducting activities in the forum. Moreover, through the affirmative and voluntary act of acquiring a stake in Dopp's recovery in Civil Case No. 88-1420, BPC not only availed itself of the benefits of this forum but of the benefits of this very Court. As a result, although BPC has only a single contact with Puerto Rico, it is a contact through which BPC has insinuated itself into the very judicial system which it now seeks to avoid.

In addition, the assertion of personal jurisdiction over the defendants in this case is strengthened by Puerto Rico's interest in enforcing the important public policy embodied in the provisions of Article 1425. While the interest of Puerto Rico in enforcing its laws cannot alone justify the assertion of jurisdiction over the defendant, in this case BPC's conduct and connection with the forum are such that it could reasonably foresee being sued as a defendant here. *See Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294, 297 (1980). By entering into an agreement which is proscribed in Puerto Rico, BPC should have anticipated being haled into court to defend the validity of the agreement. While BPC may have been ignorant of Article 1425, such ignorance of law cannot overcome a finding of foreseeability.

The Court therefore finds that BPC's conduct in purchasing a stake in a civil action proceeding in this Court, standing alone, provides a sufficient relationship among BPC, this forum, and this litigation to justify the assertion of personal jurisdiction over BPC. *See Helicópteros Nacionales de Columbia. S.A. v. Hall*, 466 U.S. 408, 417 (1984); *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980). BPC's Motion to Dismiss is therefore DENIED.[2]

B. Pritzker's Motion for Partial Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides for the entry of summary judgment in a case where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Brennan v. Hendrigan*, 888 F.2d 189, 191 (1st Cir. 1989); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 894 (1st Cir. 1988). Summary judgment is appropriate where, after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, there is not the slightest doubt as to whether a genuine issue of material fact exists. *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 804 (1st Cir. 1987); *Peckham v. Ronrico Corp.*, 171 F.2d 653 (1st Cir. 1948).

Article 1425 of the Puerto Rico Civil Code provides, in its entirety:

> When a litigated credit is sold, the debtor shall have the right to extinguish the same by reimbursing the assignee for the price the later paid for it, the judicial costs incurred by him, and the interest on the price from the day on which the same was paid.

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[2] The Court also declines BPC's invitation to transfer this action to another forum. It is clear from the record of this case that venue is proper in Puerto Rico and that it is not in the interests of judicial economy to transfer the case.

> A credit shall be considered litigated from the day the suit relating to the same has been answered.
>
> The debtor may make use of his right within nine (9) days, counted from the day the assignee should demand payment from him.

31 L.P.R.A. § 3950. Article 1425 is an extraordinary provision of law with a single, serious purpose: to discourage financial speculation in litigation. It reflects a public policy that individuals should be discouraged from acquiring a stake in any lawsuit. As the noted commentator Puig Brutau has explained, the provision "constitutes a clear example of legislative intervention based on equity to avoid professional litigants traffic with the credits they acquired underprice." Puig Brutau, *Fundamentals of Civil Law*, Book II, Vol. II § 2.5(3) (2d ed.) *see also* Note, *The Sale of A Litigious Right*, 13 Tulane L. Rev. 448 (1939) ("A desire to put an end to litigation and to prevent speculation in lawsuits has resulted in the disapproval by the civil law of the sale of litigious rights."). Article 1425 is designed to insure that "the assignee of a litigious credit could not perceive from the debtor an amount greater than what he paid to acquire the credit from the assignor." Puig Brutau, *supra*.

A debtor who wishes to utilize Article 1425 need only show that the credit which he seeks to extinguish is "litigious" and that he exercised his right within the tine provided for in the statute. Upon making such a showing, the debtor "*shall* have the right to extinguish the [credit]." 31 L.P.R.A. § 3950 (emphasis added); *see also Matheu v. Colón*, 49 P.R.R. 365, 374 (1936) ("debtor shall be entitled to extinguish credits sold"). A credit is deemed "litigious" if "the litigation pending at the time of sale or assignment of credit concern[s] the existence of the credit itself and not merely the consequences of its existence once final judgment is rendered." *Martínez v. District Court*, 72 P.R.R. 197, 199 (1951) (citing *Cucullu v. Hernández*, 103 U.S. 105 (1881)). In other words, a litigious credit is one which will achieve its ultimate value only upon

the entry of judgment in a litigation pending at the moment when the agreement transferring the credit is made. *Accord Santana v . Quintana*, 52 P.R.R. 725, 728 (1938) (quoting 10 Manresa, *Comentarios al Código Civil* 377; 27 *Enciclopedia Jurídica Española* 535). *Cf. Martínez, supra* (credit which has been adjudicated by a final judgment cannot be considered litigious); *Ojeda v. Fernández*, 32 P.R.R. 688, 691 (1924) (credit transferred prior to the commencement of litigation is not litigious). Article 1425 therefore regulates the sale to any uninterested third party of a "stake" in the potential proceeds of an ongoing litigation. *Accord* 31 L.P.R.A. § 3951(1) (excepted from the provisions of Article 1425 are assignments or sales made "[t]o a coheir or co-owner of the right assigned.")

In this case, it is beyond peradventure of a doubt that the agreements entered into between Dopp and Yari, Lincoln Realty and BPC involve litigated credits. Dopp assigned to BPC a five percent stake in the proceeds of any recovery obtained in Civil Case No. 88-1420. He assigned to Lincoln Realty, among other things, an eight percent stake in his recovery in the litigation to the extent such recovery exceeds $2 million. And he assigned to Yari various rights to proceeds from the action depending on the amount of the recovery. Each agreement explicitly discusses the fact that the decision in Civil Case No. 88-1420 will determine the existence and amount of the credits negotiated. Each of the agreements reflects an effort by Dopp to secure funds and an effort by the others to invest in the lawsuit in hope of obtaining a return on their investment at the conclusion of the case. During a Status Conference held with the Court on March 8, 1993, in Civil Case No. 88-1420, counsel for both parties consistently referred to the individuals to whom Dopp sold the credits as "investors." Article 1425 was designed to prevent precisely the type of speculation in litigation which has occurred in this case.

Defendant Yari filed a Cross-Motion for Summary Judgment (docket No. 24) and defendant Dopp filed a Memoran-

dum in Opposition to Plaintiff's Motion for Partial Summary Judgment (docket No. 34), both of which present a series of irrelevant or otherwise invalid defenses. For example, both defendants contend that the agreements at issue do not convey to the assignees title over or the right to prosecute Civil Case No. 88-1420; however, Article 1425 contains no requirement that title or the right to prosecute pass to the assignee, only that a speculative financial interest in the litigation pass. Both contend that the agreements were entered into for the valid purpose of providing Dopp with funds to maintain his action against Pritzker; however, Article 1425 itself reflects a policy decision to prohibit all transfers of litigious credits, regardless of the possibly valid reasons for consummating such transfers. Yari contends that the agreement between himself and Dopp contains a choice-of-law provision which mandates the application of California law to any disputes under the contract and therefore prohibits the application of Puerto Rico law in this instance; however, the choice-of-law provision applies only to disputes arising between Dopp and Yari regarding the interpretation of the contract.

Dopp contends that Pritzker's efforts to extinguish the credits are premature. He draws the Court's attention to the last paragraph of Article 1425—which states that the debtor's rights under the statute are not activated until the assignee demands payment from him—and argues that since in this case the assignees have not demanded payment from Pritzker no right to extinguish any credits has ripened. Dopp's assertion on this point is not entirely fanciful, but the Court nonetheless finds it unavailing.

The interpretation of the third sentence of Article 1425 urged by defendants would render the statute practically useless, because all that assignees of litigious credits would need to do to avoid redemption would be to allow the original creditor to litigate, obtain judgment and collect it, then distribute the proceeds to the assignees. Court should avoid reading statutes in a way that would lead to unreasonable results, *Díaz Marín v. Municipality of San Juan*, 117 D.P.R. 334, 342

(1986); and should construe statutes in the sense most suitable to the essential legislative intent. *Esso Standard Oil v. P.R.P.A.*, 95 PRR 754, 766 (1968).

The purpose of the nine-day term in Article 1425, according to commentators to prevent the unfair situation of a debtor litigating at length with an assignee and then, when the assignee has prevailed, exercising the right of redemption. See, Garcia Goyana: *Concordancias. Motivos y Comentarios al Código Civil Español*, Madrid, 1852, Vol. III, p. 437.

It is more consonant with the purpose of the statute if a debtor can exercise his right of redemption as soon as he has knowledge of the assignment, and this put an end to or limit unnecessary litigation and, consequently, discourage speculation in litigation.

As a matter of statutory construction, moreover, the third sentence of Article 1425 should not be interpreted as a limitation on the commencement of the right of redemption. Article 1414 of the same Civil Code, 31 L.P.R.A. § 3924, which deals with the analogous right of legal redemption provides: "The right of legal redemption *cannot be exercised except within nine (9) days . . .*" (emphasis added). Had the legislature desired to place a similar restriction on the commencement of the right to redeem litigious credits, it would have used the limiting language of Article 1414, rather than the more flexible wording of Article 1425. On the other hand, and incorporating a different reasoning more consonant with plaintiff's interpretation, the Court conceives that the last paragraph of Article 1425 uses the date on which the assignee demands payment from the debtor as the point from which its nine-day prescription period commences. It does not create a separate requirement that a demand for payment be made by the assignee to activate the debtor's rights under the statute. In this case, a demand for payment has been made against Pritzker by Dopp, who is in effect acting on behalf of the assignees. Their demands for payment have therefore been made albeit indirectly. Under these circumstances, the Court believes that the prescription period for Article 1425 com-

menced on the date Pritzker knew officially that the assignments had been made. This date was October 9, 1992, when Dopp responded to Pritzker's interrogatories. Pritzker exercised his rights under the statute on October 16, 1992, when he sent to the assignees the letters informing them of his intention to exercise his rights under Article 1425. Pritzker therefore duly exercised his rights within the time provided by the statute.

III. Conclusion

The agreements entered into between Dopp and Yari, BPC and Lincoln Realty involve litigious credits; therefore, Pritzker is entitled as a matter of law to extinguish the credits by reimbursing the assignees the amounts which they paid to Dopp, along with any judicial costs and interest. The Court must determine the amounts which Pritzker must pay to the assignees. In order to do so, the Court will conduct a hearing to receive all relevant evidence.

Pritzker believes that since the Court has ruled that the agreements involve litigious credits the issue of the amounts to be paid to the assignees is the only issue remaining and further proceedings in Civil Case No. 88-1420 are not necessary. The Court does not agree. Although the agreements are complicated—and the Court faces a fearsome task in trying to determine the percentage of the stakes purchased by Yari and Lincoln Realty—it is clear that Dopp has retained some share of his financial interest in the case. As a result, regardless of the final decision entered in Civil Case No. 92-2825, the Court must proceed toward a Judgment in Civil Case No. 88-1420. Both cases will therefore proceed accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 5th day March, 1994.

JAIME PIERAS, JR.
JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2373

PAUL DOPP

Plaintiff, Appellant,

—v.—

HTP, CORP, ET AL.,

Defendants, Appellees.

No. 93-2374

PAUL S. DOPP,

Plaintiffs, Appellees,

—v.—

HTP, CORP., ET AL.,

Defendants, Appellees,

BOB YARI,

Appellant.

No. 94-1128

PAUL S. DOPP, ET AL.,

Plaintiffs, Appellees,

—v.—

HTP, CORP, ET AL.,

Defendants, Appellees,

LINCOLN, REALTY, INC.,

Appellant.

No. 94-1129

PAUL S. DOPP, ET AL.,

Plaintiffs, Appellants,

—v.—

HTP, CORP, ET AL.,

Defendants, Appellees,

BAIRD PATRICK & CO. INC.,

Appellant.

No. 94-1130

PAUL S. DOPP,

Plaintiff, Appellee,

—v.—

JAY PRITZKER,

Defendant, Appellant.

NO. 93-1131

PAUL S. DOPP,

Plaintiff, Appellee,

—v.—

HTP, CORP, ET AL.,

Defendants, Appellees.

Before

Torruella, *Ch. Judge*
Selya, Cyr, Boudin, Stahl, *Circuit Judges*
*Zobel, *District Court Judge*

ORDER OF COURT

Entered January 12, 1995

The panel of judges that having rendered the decision in these cases having voted to deny the petitions for rehearing submitted by Bob Yari and Paul S. Dopp and their suggestions for the holding of rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the court e ban,

It is ordered that the both suggestions for rehearing en banc be denied.

By the Court

FRANCIS P. [ILLEGIBLE]
Clerk

[cc: Messrs. Nigagliono, Antonetti, Melendez, Boneta, Bermudes, Lugo-Rigau, Crane, Rodriguez, Mahoney and Seles]

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* of the district of Massachusetts, sitting by designation

(2)

Supreme Court, U.S.
FILED
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No. 94-1517

In the Supreme Court of the United States

OCTOBER TERM, 1994

BOB YARI,
PETITIONER,
v.
JAY PRITZKER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Statement of the Case[1]

This lawsuit concerns the application of a provision of Article 1425 of the Civil Code of Puerto Rico, P.R. Laws Ann. tit. 31 (1990). That statute provides that when a plaintiff sells

[1] Yari's Statement of the Case for this Court varies considerably from the facts found by the District Court and affirmed on appeal. Yari's petition does not suggest how he intends to avoid those factual findings. Accordingly, Pritzker relies on the facts set forth in the opinions of the District Court, including *Dopp* v. *HTP Corporation*, 831 F.Supp. 939 (D.P.R. 1993), and in the opinion of the Court of Appeals, *Pritzker* v. *Yari*, 42 F.3d 53 (1st Cir. 1994). Citations to those opinions refer to the opinions as reprinted in the appendix to Yari's petition.

his lawsuit, the defendant has the right to extinguish the claim sold by reimbursing the purchaser for the price paid, together with interest and costs. The United States District Court for the District of Puerto Rico, sitting in diversity, held that Article 1425 applied to the sale by Paul S. Dopp of interests in Dopp's lawsuit against Jay Pritzker, *Dopp* v. *HTP Corporation*, United States District Court for the District of Puerto Rico, Civil Action No. 88-1420. Dopp, the District Court found, sold interests in that lawsuit to petitioner Bob Yari, among others. Accordingly, Pritzker, upon payment to the purchasers, was permitted to extinguish Dopp's lawsuit against him to the extent of the interests purchased.

All parties appealed from a final judgment in Pritzker's favor. Each of the purchasers, and Dopp, challenged the application of Article 1425 to the transactions at issue. Pritzker cross-appealed, seeking reversal of a ruling of the District Court limiting the amount that Pritzker was entitled to extinguish on account of Dopp's transaction with Yari. On appeal, the United States Court of Appeals for the First Circuit affirmed the District Court's holding that Article 1425 applied to each of the agreements and further ruled that Pritzker was entitled to extinguish the full credit transferred to Yari. *See Pritzker* v. *Yari*. Yari alone seeks certiorari from this Court.

Reasons for Denying the Writ

Supreme Court Rule 10 provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion." Rule 10 spells out factors "indicat[ing] the character of reasons that will be considered." Yari does not clearly identify the discretionary factors on which he relies in seeking review. Certainly he has no claim that the decisions of the courts below construing Article 1425 are in conflict either with the decision of a state court of last resort or of another United States Court of Appeals. *See* Rule 10.1(b). The only possible anchors for Yari's request for certiorari are that the First

Circuit either "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's power of supervision" or "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." *See* Rule 10.1(a) and (c). It is plain from a review of Yari's petition, however, that there is no reason for this Court to exercise its discretion to grant certiorari.

The essence of Yari's complaint is that the First Circuit erroneously interpreted Article 1425 of the Civil Code of Puerto Rico. Yari claims that at issue in this case was not the sale of an interest in litigation, to which consequences attach under the Code, but simply a loan, whose cost "is unknown until the litigation ends." Yari at 19. As to that claim, and others asserted by Yari, the District Court and the First Circuit concluded otherwise.

That conclusion hardly constitutes such a significant "depart[ure] from the accepted and usual couse of judicial proceedings" as "to call for an exercise of this Court's power of supervision." *See* Rule 10.1(a). To the contrary, the First Circuit found that the Civil Code applied to Yari's contract with Dopp by looking at its plain language, in light of its "'single, serious, purpose'. . .'to discourage financial speculation in litigation.'" *Pritzker* v. *Yari*, 19a. Although Yari argued that other authorities *from outside of Puerto Rico*, including French commentators, *see* Yari at 16, pointed to a different conclusion, the First Circuit found "such extra textual measures" to be unjustified,

> *especially given the interpretive command of the Puerto Rico legislature: "When a law is so clear and free from all ambiguity, the letter of the same shall not be dis-*

> *regarded, under the pretext of fulfilling the spirit thereof.*" P.R. Laws Ann. tit. 31, § 14 (1967 & Supp. 1989)

Pritzker v. *Yari* at 21a (emphasis added).[2]

Far from "blindly rel[ying] on 'plain meaning'" as Yari asserts, Yari at 23, the courts below found that the Civil Code did not contain the exceptions Yari sought and that the "statutory text," viewed in light of the policy expressed by local sources, was "not sufficiently problematic to invite judicial editing." *Pritzker* v. *Yari*, at 23a. The courts below similarly disposed of Yari's other defenses to the application of Article 1425. *See*, *e.g.*, *id.* at 23a, 25a and 28a-29a. That careful interpretation of the Civil Code did not in any way "depart from the accepted and usual course of judicial proceedings."

Nor does Yari's petition present an "important question of federal law" not yet decided by this Court, or decided by the First Circuit "in a way that conflicts with applicable decisions of this Court." *See* Rule 10.1(c). In an effort to give a federal flavor to what is unquestionably a garden variety interpretation of the Puerto Rico Civil Code, Yari asserts that the courts below violated Article III, Section I of the United States Constitution by usurping "legislative functions." Yari at 14. That is groundless argument. The First Circuit and the District Court did precisely what was required of them by this Court's decision in *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64 (1941).

Pursuant to *Erie*, the courts below sitting in diversity properly looked to the law of Puerto Rico, as contained in its Civil Code and the cases interpreting it, to arrive at a rule of decision. Article III clearly does not prohibit federal courts from intrepreting state statutes. "[A] federal court adjudicating a State-created right solely because of the diver-

[2] The First Circuit would have been equally justified in finding, had it engaged in the extra textual analysis Yari seeks, that Yari's reliance on these commentators was based entirely on statements either misquoted or taken out of context, as Pritzker argued below.

sity of citizenship of the parties is for that purpose, in effect, . . . another court of the state . . .". *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108 (1945); *see also Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 347 (1816). Far from deciding this case in conflict with prior decisions of this Court, the courts below followed the prior decisions of this Court to the letter.

Conclusion

For the reason stated above, this Court should decline to issue the requested writ.

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Dated: April 14, 1995